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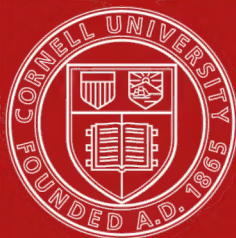
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Digest of the New York Court of Appeals



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DIGEST OF THE NEW YORK
COURT OF APPEALS REPORTS

VOLUMES 126 TO 153 INCLUSIVE

WITH

A TABLE OF COURT OF APPEALS CASES CITED, DISTINGUISHED,
LIMITED AND OVERRULED, TOGETHER WITH CASES RE-
PORTED BELOW AND AFFIRMED OR REVERSED
BY THE COURT OF APPEALS

BY
AMASA J. PARKER, JR.
ALBANY, N. Y.

VOLUME III.

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DIGEST
OF THE
NEW YORK COURT OF APPEALS REPORTS,
VOLUMES 126 TO 153 INCLUSIVE.

Abandonment ; *See Insurance, V.*

Abatement ; *See Pleading, II, IV.*

Abatement and Revival.

The entry of an order of reversal by the General Term in a case argued before the death of the lunatic, but decided after his death, though the order is antedated, does not abate the proceeding. *Carter v. Beckwith*, 128 N. Y. 312.

Where action commenced by personal service on some defendants, service completed, as to others, after plaintiff's death by publication. *Reilly v. Hart*, 130 N. Y. 625.

Upon death of a plaintiff, suing as assignee for creditors, his executor will not be substituted, unless the papers show that he has been substituted as assignee.

Steinhouser v. Mason, 135 N. Y. 635.

Upon the death of the sole plaintiff in an action to determine a claim to real property, the court may substitute the devisee of such lands and direct the continuance of the action by him, under section 757 of the Code.

Higgins v. Mayor, etc., of N. Y., 136 N. Y. 214.

Where defendant has recovered judgment, which has been vacated and a new trial ordered on the plaintiff's application, such order is proper in protection of the defendant's right to a new trial. *Id.*

Mere lapse of time cannot defeat the application for a continuance of action in the name of the representative of party who has died. *Mason v. Sanford*, 137 N. Y. 497.

In equity actions on account of prejudicial *laches* the court may refuse the reviver within the ten years' limitation. *Id.*

Where, pending a foreclosure suit, the owner of an undivided interest dies, and the heirs or devisees are not brought in, the estate of deceased is not affected.

Stephens v. Humphryes, 141 N. Y. 586.

Abatement and Revival—Continued.

The Forest Commission has been a continuous body since its creation under the act of 1885; actions commenced by it were not abated by the repeal of the act creating the body—viz., by chapter 395 of 1895.

People ex rel. Forest Commission v. Campbell, 152 N. Y. 51.
An action by the directors of a banking corporation for voluntary dissolution abates upon the entry of judgment of the dissolution. *Matter of Murray Hill Bk.*, 153 N. Y. 199.

Absconding Debtor; See Attachment.**Accommodation Paper; See Bills and Notes.****Accord and Satisfaction.**

Case in which a collection and retention of money by physician made an accord and satisfaction of an unliquidated account, rendered for larger sum than was received from patient.

Fuller v. Kemp, 138 N. Y. 231.

Debtor and one joint creditor cannot, without the consent of the other creditor, effect an accord and satisfaction which will cut off the right of the latter.

Hathaway v. Orient Ins. Co., 124 N. Y. 409.

Where a debtor sends a check for a portion of a disputed claim, accompanied by a receipt for signature stating that the payment is in full, the collection of such check by the creditor, after a refusal by the debtor to pay more, imports an election to be bound by the condition and constitutes an accord and satisfaction, although he does not return the receipt, but gives one on account, unless the latter is acquiesced in by the debtor.

Nassoiy v. Tomlinson, 148 N. Y. 326.

Accounts and Accounting; See Executors and Administrators; Partnership.

A creditor who presents a claim against his debtor for a balance alleged to be due, where the amount of the original indebtedness is undisputed, should not be turned out of court for not showing the deductions by way of credits, and the complaint of a creditor of a partner, suing the assignee of the firm for an accounting, should not be dismissed.

Cheever v. Brown, 128 N. Y. 670.

In the absence of an amendment, neither the referee nor the appellate court can allow, on a partnership accounting, a larger amount to the claimant than he presented.

Newhall v. Wyatt, 139 N. Y. 452.

Court cannot retain action to enable plaintiff to prove another and different cause of action against one defendant alone.

Sherburne v. Taft, 142 N. Y. 619.

Accounts and Accounting—Continued.

When action for an accounting cannot be maintained against the trustee under a mortgage.

Harrison v. Union Trust Co., 144 N. Y. 326.

Account Stated.

A complaint in an action upon an account stated need not allege the subject-matter of the original debt.

Schutz v. Morette, 146 N. Y. 137.

Where a mistake materially affecting the result is shown to have occurred, an account stated may be opened so far as to correct such mistake.

Convillie v. Shook, 144 N. Y. 686.

Accumulations ; See Trusts, II.**Acknowledgment ; See Deeds, III.****Acquittal ; See Criminal Law, V.****Action, Right of.**

An action is not maintainable on a bond given by a deputy sheriff to the sheriff, conditioned to pay to the latter a portion of all fees received, to recover his fees as peace officer.

Deyoe v. Woodworth, 144 N. Y. 448.

A married woman may, to protect her inchoate right of dower, maintain an action to cancel of record a deed purporting to be executed by herself and her husband, on the ground that it is forgery so far as it purports to be executed by her, and is not obliged to wait for admeasurement of dower after his death.

Clifford v. Kampfe, 147 N. Y. 383.

Such action may be maintained although the name of the wife in the deed is not exactly that of the plaintiff, where the similarity is so great as to deceive persons not intimately acquainted with her.

Id.

An action in aid of an attachment under subdivision 2 of section 655 of the Code cannot be maintained unless the summons in the attachment action has been served without the state or by publication, and the defendant therein has made default.

Whitney v. Davis, 148 N. Y. 256.

An action under section 2653a of the Code, to determine the validity of probate of a will, cannot be maintained by one claiming in hostility to the will.

Lewis v. Cook, 150 N. Y. 163.

A receiver may maintain an action in equity to compel a person to account and deliver funds which the receiver has acquired title to.

Armstrong v. McLean, 153 N. Y. 490.

Ademption ; See Legacy.

Adjudication; *See Former Adjudication*; *Judgment*.

Administrators; *See Executors and Administrators*.

Adulteration.

The addition of a foreign and artificial ingredient to a food product is an adulteration. *People v. Girard*, 145 N. Y. 105.

Advancements.

A conveyance of a parcel in fee absolute and of another parcel subject only to a life estate may be shown by parol to have been intended as an advancement.

Palmer v. Culbertson, 143 N. Y. 213.

Adverse Possession.

What is sufficient evidence to establish title by adverse possession to a strip of land forming part of a wall adjoining a building.

Baron v. Korn, 127 N. Y. 224.

Where party has secured title by adverse possession, his subsequent contract for the purchase of an outstanding claim of title will not estop him from setting up his title already acquired through the adverse possession.

Greene v. Couse, 127 N. Y. 386.

May be continued by assignee of one whom landlord recognizes and accepts as tenant at will.

Landon v. Townshend, 129 N. Y. 166.

The act of a third person building a fence around premises, not interfering with tenant's occupation, and without notice to landlord, does not constitute a break in adverse possession. *Id.*

Acts of ownership are presumed to be done under an existing conveyance.

McRoberts v. Bergman, 132 N. Y. 73.

Where the owner of land excludes for twenty years the owner of an easement, who acquiesces in the exclusion, the easement is lost by adverse possession. *Woodruff v. Paddock*, 130 N. Y. 618.

This rule applies to an abutting owner's private rights in a street. *Id.*

Specific adverse title is not necessary to constitute adverse possession. If there be color of title, a general assertion of ownership will suffice.

American Bank Note Co. v. N. Y. Elev. R. R. Co., 129 N. Y. 252.

Mere provisions in the charter of a railroad corporation for payment of damages does not subordinate the entry of the corporation to the private right. *Id.*

While ignorance does not affect legal rights, it may be taken into account in determining the character of an adverse occupation.

Id.

Adverse Possession—Continued.

Rights by prescription are measured by the extent of the use.

A right of way for one purpose gained by user cannot be turned into a right of way for another purpose. *Id.*

The institution of proceedings by a party for condemnation of property held by adverse possession does not destroy a prescriptive right fully acquired, but is an admission tending to show the character of the possession. *Id.*

When adverse possession is not sustained. *Id.*

A statement agreed upon that a person and his grantees were in undisturbed possession of the land for twenty years and upwards does not show that the possession was adverse. What is essential to constitute an adverse holding upon a written conveyance, under Code Civ. Pro. § 369.

Kneller v. Lang, 137 N. Y. 589.

Facts sufficient under section 370 of the Code, under which party had established a constructive possession of property and a title by adverse possession.

Northport Real Estate & Improvement Co. v. Hendrickson, 139 N. Y. 440.

Use not sufficient to constitute adverse possession of land between high and low water marks.

De Lancey v. Piepgras, 138 N. Y. 26.

The fencing in and occupation of lands laid down as a street on a map referred to in the title deeds of the parties in possession, will not be deemed adverse as to the easement of purchasers of lots abutting on such streets.

Village of Olean v. Steyner, 135 N. Y. 341.

Failure to cultivate, enclose and occupy land, though taxes are paid, destroys right to claim adverse possession.

Mission of Immaculate Virgin v. Cronin, 143 N. Y. 524.

Where the timber cut was used elsewhere and no improvements made, constructive possession cannot be claimed. *Id.*

Affidavit.

Allegations in affidavits held to be an absolute nullity as an affidavit of denial.

Simmons v. Craig, 137 N. Y. 550.

Agency ; See Brokers ; Factors ; Husband and Wife ; Insurance, I ; Ratification.

I. AUTHORITY.

II. RATIFICATION.

III. UNDISCLOSED PRINCIPAL.

IV. MUTUAL RIGHTS AND LIABILITIES.

V. AGENT'S LIABILITY TO THIRD PERSONS.

VI. PRINCIPAL'S LIABILITY FOR AGENT'S ACTS.

Agency—Continued.**I. AUTHORITY.**

What proof that an agent having authority to draw checks did so while his principal was dying, is insufficient to show authorization. *Matter of James*, 146 N. Y. 78.

The power of an agent to collect and receive payment of rents ceases upon the principal's death.

Farmers' Loan & Trust Co. v. Wilson, 139 N. Y. 284.

The fact that the agent was entitled to commissions upon the rents collected, *held*, not to create such an interest as to take the case out of the rule. *Id.*

An agreement by one partner for the services of the other in a business other than the partnership is not binding.

Leavitt v. Chase, 129 N. Y. 660.

An architect acting as agent for both owner and builder may consent to change in plans. *Thomas v. Stewart*, 132 N. Y. 580.

Otherwise if employed merely as architect. *Id.*

II. RATIFICATION.

A husband is not personally liable to a proposed lessee, with whom he has been negotiating, for a failure of his wife to execute the lease, where such lessee knew that in so negotiating he was acting only as his wife's adviser and endeavoring to agree upon terms which he could advise her to accept.

Baer v. Bonyne, 147 N. Y. 393.

The receipt of the proceeds of an unauthorized contract made by an agent, where the principal at the time of such receipt has knowledge, actual or implied, of the facts, operates as a ratification of such contract. *Smith v. Barnard*, 148 N. Y. 420.

Before a principal can be held to have ratified the unauthorized act of an assumed agent, he must have full knowledge of the facts.

Trustees, etc., of Easthampton v. Bowman, 136 N. Y. 521.

Where the principal accepts the benefit of agent's contract, it amounts to a ratification. *Bliven v. Lydecker*, 130 N. Y. 102.

III. UNDISCLOSED PRINCIPAL.

Parol evidence is admissible to show that the person who made the contract was an agent and not a principal.

Brady v. Nally, 151 N. Y. 258.

Where agents in shipping goods acted without disclosing their agency, the carrier was entitled to contract with them as principals.

Robertson v. Nat. Steamship Co., Limited, 139 N. Y. 416.

IV. MUTUAL RIGHTS AND LIABILITIES.

Moneys remitted by a principal to his agent for the purpose of

Agency—Continued.

putting him in funds to meet obligations and liabilities incurred by him in the business are impressed with a trust in favor of the principal, and may be recovered.

Roca v. Byrne, 145 N. Y. 182.

A mere naked authority in the execution of which the agent has no other interest than that which arises from his employment and right to earn his compensation is revocable at any time before execution.

Terwilliger v. Ontario, C. & S. R. R. Co., 149 N. Y. 86.

But where such authority is given as security for a claim or for a valid consideration within the law applicable to executory contracts, it is irrevocable. *Id.*

A party receiving money from an agent in satisfaction of a personal debt with knowledge of its fiduciary nature is liable to the principal. *Gerard v. McCormick*, 130 N. Y. 261.

On breach of contract by agent in refusing to deliver goods, principal may recover as damages value of goods at time of breach.

Monnet v. Merz, 127 N. Y. 151.

It is no defense to the principal's action against the agents for an accounting, that an action is pending against the agents by the United States government to recover a penalty for overvaluation of goods imported. *Id.*

Nor is the payment of a sum in the defense and settlement of such suit available as a claim for reimbursement. *Id.*

Sums paid counsel retained in such suits in behalf of the principal, and by his specific authority, may be claimed by agent. *Id.*

The power of an agent to create rights by contract for his principal implies a duty to observe and not defeat them.

American Steam Boiler Ins. Co. v. Anderson, 130 N. Y. 134.

So held in regard to the obligation of insurance agents who procured policies to be canceled which they had obtained for their former principal. *Id.*

The principal can recover commissions paid to such agents. *Id.*

V. AGENT'S LIABILITY TO THIRD PERSONS.

A member of a firm of brokers who is a member of a club, by accepting an appointment as one of a purchasing committee thereof, assumes a fiduciary relation and cannot reserve a benefit for himself or his firm, but a commission allowed by the vendor belongs to the club.

Redhead v. Parkway Driving Club, 148 N. Y. 471.

VI. PRINCIPAL'S LIABILITY FOR AGENT'S ACTS.

A party is not chargeable with knowledge of the commencement of a foreclosure obtained by his attorney while acting for another. *Denton v. Ontario County Nat. Bk.*, 150 N. Y. 126.

Agency—Continued.

Principal is not chargeable with knowledge which the agent has gained in a scheme to defraud the principal.

Henry v. Allen, 151 N. Y. 1.

A principal is not charged with constructive notice where the agent has not actual notice.

Wheatland v. Pryor, 133 N. Y. 97.

False statements by a broker employed in negotiating an exchange of real estate as to the price paid for his property by an owner who accepted the securities so procured, *held*, to be imputable to him.

Fairchild v. McMahon, 139 N. Y. 290.

A principal is not chargeable with knowledge of an agreement made by his agent contrary to his instructions, and is entitled to recover on checks received from the agent under an agreement between the agent and the banker that the checks were to be given only as memoranda.

Id.

Agency cannot be established by declaration of agent or third person which has not come to knowledge of principal.

Foster v. Bookwalter, 152 N. Y. 166.

Albany; *See Municipal Corporations.*

Aliens.

An alien woman by her marriage to a citizen becomes a naturalized citizen of the United States.

Wainwright v. Low, 132 N. Y. 313.

The title to lands taken by escheat, and undisposed of by the state, may be surrendered to heirs of aliens.

Id.

Land left by one who died leaving only alien heirs descends to alien heirs-at-law.

Id.

Alimony; *See Divorce.*

Ambiguity; *See Contracts, IX; Deeds; Evidence; Statutes; Wills.*

Amendment; *See Practice.*

Animals.

A vicious domestic animal, if permitted to run at large, is a nuisance; liability of owner considered.

Quilty v. Battie, 135 N. Y. 201.

This liability extends to the case of a married woman who permits her husband to harbor a vicious dog upon the premises owned by her.

Id.

Owner is presumed to have a knowledge of its nature.

Hahnke v. Friederich, 140 N. Y. 224.

Where he kept dog chained and had knowledge of harm done by it, the question of negligence is for the jury.

Id.

Animals—Continued.

The owner of a diseased animal which has been killed in pursuance of chapter 661, Laws 1893, is only entitled to the value of animal in its diseased condition.

Tappen v. State, 146 N. Y. 44.

Answer; *See Pleading.*

Ante-Nuptial Agreement; *See Husband and Wife.*

Appeal; *See Costs*; *Criminal Law*; *Error*; *Justices' Courts*; *Practice*; *Reference*; *Surrogates' Courts.*

I. GENERALLY.

1. *Right of.*
2. *Practice on.*
3. *What Questions Raised.*
4. *Judgment on.*

II. TO COURT OF APPEALS.

1. *What Appealable and What Not Appealable.*
2. *What Questions Raised.*
3. *Practice.*
4. *Remittitur.*
5. *Granting or Refusing New Trial.*

I. GENERALLY.

1. *Right of.*

The receipt by defendants in partition of the shares conceded to be due to them, *held*, not to preclude them from prosecuting appeals from the judgment. *Mellen v. Mellen*, 137 N. Y. 606.

Where a referee's decision is in the nature of a nonsuit without findings of fact, it can only be sustained on appeal by showing that a finding of the essential facts to the plaintiff's recovery would have been so destitute of sufficient evidence to support them as to be erroneous as matter of law.

Cowen v. Paddock, 137 N. Y. 188.

In an action to set aside an assignment, where two attachment creditors were made defendants, and answered admitting allegations of the complaint as to fraud and united with plaintiff in the action, and the assignment is sustained, such creditors have the right to appeal. *Roberts & Co. v. Victor*, 130 N. Y. 585.

Such an appeal involved the power and not the discretion of the General Term. *Id.*

One required to give security for payment of expenses may be regarded as a party. *Id.*

Although a complaint containing two causes of action, upon which an attachment issued, afterwards vacated, be amended by

Appeal—*Continued.*

dropping one cause of action, the plaintiff has a right to appeal from a judgment dismissing the amended complaint.

Norfolk & N. B. Hosiery Co. v. Arnold, 131 N. Y. 553.

Leave to bring an action to vacate charter of a corporation is discretionary and not reviewable.

People v. Buffalo Stone & Cement Co., 131 N. Y. 140.

The denial of a motion to amend is discretionary and not reviewable.

Rice v. Grange, 131 N. Y. 149.

An order obtained on a default is not appealable by the party making the default.

Matter of Peekamoose Fishing Club, 151 N. Y. 511.

The decision of the County Court upon motion to confirm the decision of commissioners appointed to determine the necessity of a highway is final only on the questions of necessity and the amount of compensation.

Matter of De Camp, 151 N. Y. 557.

On appeal to a surrogate from the confirmation of an appraiser's report as to an estate for the purpose of a transfer tax, an appellant should be permitted to file additional allegations that, since the appraisal, litigation has been commenced to determine who are the heirs and next of kin of the decedent.

Matter of Westurn, 152 N. Y. 93.

A disallowance of a demurrer to an indictment may be reviewed on an appeal from the judgment of conviction, even though the objection was not renewed on the trial.

People v. Wilson, 151 N. Y. 403.

Where a counter-claim is extinguished by the judgment, the amount thereof is to be added to that of the judgment in determining the real amount in controversy.

Charlton v. Scoville, 144 N. Y. 691.

A determination by the General Term as to the weight of evidence is final.

Arnold v. Norfolk & New Brunswick Hosiery Co., 148 N. Y. 392.

Executors may appeal from decree requiring them to give bond.

Matter of O'Brien, 145 N. Y. 379.

Under section 455 of the Criminal Code, the decision of the court on a criminal trial as to the indifference of a juror is not reviewable.

People v. McGonegal, 136 N. Y. 62.

A misstatement of the evidence in the charge of the court, which could have been corrected if the attention of the court had been called to it in season, is not reviewable on appeal without an exception.

Id.

A certificate that the case contains all the evidence is not necessary in an action tried by jury to authorize a review of exceptions to the rulings or charge of the trial judge.

Rosenstein v. Fox, 150 N. Y. 354.

An appeal will lie to the Appellate Division from an order review-

Appeal—Continued.

ing the determination of a county clerk as to regularity of nominations.

Matter of Emmet, 150 N. Y. 538.

Where there is no conflict of evidence the General Term may order the probate of a will, where that is the only issue.

Matter of Wilcox, 131 N. Y. 610.

If there are other issues it should be remitted to the surrogate for trial.

Id.

The General Term may, without an exception, review the granting of an extra allowance, and the Court of Appeals will pass upon the legal right to grant it.

Hanover Fire Ins. Co. v. Germania Fire Ins. Co., 138 N. Y. 252.

Discretion of court at Special Term is not reviewable.

Freeman v. Grant, 132 N. Y. 22.

Unless exceptions relating to the nature of an action or efficiency of a verdict are well taken, no appeal will lie.

Lockwood v. Bartlett, 130 N. Y. 340.

The right to appeal from an order appointing commissioners of appraisal is not waived by appearing and cross-examining witnesses.

Matter of N. Y., Lackawanna, etc., R. R. Co., 126 N. Y. 632.

Where an order does not state the grounds upon which it has been made, it is presumed to have been made in the discretion of the court and is not appealable.

Cohn v. Baldurn, 141 N. Y. 563.

In such a case the court cannot look to the opinion of the General Term to ascertain the ground of its decision.

Id.

An error of law in an order on the facts may be reviewed on appeal.

Matter of Bartholick, 141 N. Y. 166.

But where a new trial is had, such error cannot be pleaded against an order of affirmance of finding of jury.

Id.

2. Practice on.

Without findings or requests to find, or exceptions, a question of law is not before an appellate court for consideration.

Mack v. Colleran, 136 N. Y. 617.

The absence from the record of a receipt for a payment for work under a building contract, the payment having in fact been proved, is no ground for reversal.

McSorley v. Prague, 137 N. Y. 546.

In an action for an injunction, the objection that the facts pleaded are not sufficient to confer equity jurisdiction will not be considered for the first time on appeal.

Cunningham v. Fitzgerald, 138 N. Y. 165.

When an appeal is in time, under section 1316 of the Code.

Whitmore v. Village of Tarrytown, 137 N. Y. 409.

The objection of a defect of parties plaintiff which had not been pleaded, and the refusal of the trial court to allow the cause to

Appeal—Continued.

stand over until the point could be raised, are not grounds for reversal.

Knox v. Metropolitan Elevated Ry. Co., affirmed without opinion in 128 N. Y. 625.

What appeal does not come within section 1331 of the Code, which requires the amount of the undertaking on appeal to be fixed by the court.

Stephens v. Humphries, appeal dismissed, 135 N. Y. 637. Where the complaint was dismissed upon the opening of plaintiff's counsel, any offer to prove made in connection with the opening, unless objected to as inadmissible under the pleadings, should be regarded as a part thereof.

Kley v. Healey, 127 N. Y. 555. Where, upon the granting of a peremptory *mandamus* with costs, a stay pending appeal having been denied, defendant complied with the writ, paid the costs, and his appeal to the General Term was dismissed on the ground that there was no question to be determined, such dismissal was error.

Martin v. W. J. Johnson Co., 128 N. Y. 605. The rule preventing a party from appealing from an order under which he has accepted a benefit does not apply to one made for the purpose of removing an obstacle in the way of the respondent's proceeding with the motion on which the order was made.

Matter of N. Y., Lackawanna, etc., R. R. Co., 126 N. Y. 632. Where certain letters were not printed in the case on appeal, their exclusion for immateriality could not be deemed error.

DeKlyn v. Silver Lake Ice Co., affirmed without opinion in 128 N. Y. 582.

A refusal of the trial court to find on defendant's request facts established by uncontradicted evidence, coupled with a finding of substantial damages and an exception to a refusal to nonsuit, may be reviewed on appeal on exception.

Bohm v. Met. Elev. Ry. Co., 129 N. Y. 576. Where findings are inconsistent, those most favorable to appellant are controlling on appellate court.

Traders' Nat. Bank v. Parker, 130 N. Y. 415. But not where the court can reconcile the findings of reasonable construction.

Id. Where neither party requests to have any question of fact submitted to the jury, but each asks for a verdict in his favor, upon appeal the disputed facts are deemed to have been determined in favor of the party for whom the verdict is directed.

Daly v. Wise, 132 N. Y. 306. A quorum of four justices holding an Appellate Division of the Supreme Court are, in contemplation of law, the Appellate

Appeal—Continued.

Division, and their unanimous vote of affirmance is a unanimous decision within the meaning of the Constitution.

Harroun v. Brush Electric Light Co., 152 N. Y. 212.

Upon an appeal from a judgment which is entire and against several defendants, the appellate court must either totally affirm or reverse both as to the recovery and as to all the parties; but in case where there are separate and distinct judgments, the judgment must be reversed as to such claim of defense and only to the parties' interest therein and affirmed as to the remainder.

Altman v. Hofeller, 152 N. Y. 498.

A decision of the General Term is invalidated where a judge who granted the order at Special Term sits in the General Term.

Van Arsdale v. King, 152 N. Y. 69.

It is not a fatal objection on appeal that the case was tried outside of the pleadings in the absence of some specific objection to that course.

Farmers' L. & T. Co. v. Housatonic R. R. Co., 152 N. Y. 251.

Finding of jury on a question of law erroneously submitted will be sustained if correctly made. *Ming v. Corbin*, 142 N. Y. 334.

Rulings on a question of law must appear affirmatively by the record.

McCulloch v. Dobson, 133 N. Y. 114.

A motion to set aside the report of a referee on the ground that his mind had become impaired is discretionary, and not reviewable. *Id.*

An order granting additional allowance of costs is not reviewable. *Id.*

Appeal from nonsuit will not be sustained on ground that proof of negligence was defective in not showing facts assumed.

Stuter v. McEntee, 142 N. Y. 200.

On an appeal under section 749 of the Code of Civil Procedure from the commitment of children pursuant to section 291 of the Penal Code, when the evidence upon which the appeal is allowed does not allege any errors with reference to a determination of the facts, the evidence is not required to be returned, and the failure of the magistrate to preserve it furnishes no ground for reversal.

People v. Giles, 152 N. Y. 136.

When a judgment may be reversed in part and only as to parties interested therein and affirmed as to the remainder.

Altman v. Hofeller, 152 N. Y. 498.

Where the evidence is conflicting, the court will not draw an inference to support a judgment.

Clemans v. Sup. Assembly Royal Soc. of Good Fellows, 131 N. Y. 485.

A plain violation of the rights of defendant would be necessary to obtain a reversal of conviction because of an erroneous opening upon the trial of a criminal action.

People v. Van Zile, 143 N. Y. 368.

Appeal—*Continued*.

Reference to a former indictment of defendant jointly with another, as preliminary to reading his testimony upon trial of that indictment, affords no ground for reversal. *Id.*

The relation of one proposition to another which qualifies it may be referred to. *Myers v. Dean*, 132 N. Y. 65.

Evidence erroneously admitted at the trial on behalf of appellant cannot be considered on appeal.

Brady v. Mayor, etc., of N. Y., 132 N. Y. 415.

Where the evidence supports the defendant's claim, a refusal to find for plaintiff is immaterial.

Aron v. De Castro, 131 N. Y. 648.

An error will not be presumed, but must be clearly proven.

Wells v. Garbut, 132 N. Y. 430.

The court must find that no error was committed in any ruling to which an exception was taken before it can reverse.

Reed v. McConnell, 133 N. Y. 425.

The effect of a request for the direction of a verdict is to clothe the court with the functions of a jury. Effect of such requests and denials thereof discussed and considered on appeal.

Thompson v. Simpson, 128 N. Y. 270.

Application of rule that a judgment will not be reversed because of inconsistent conclusions of law, where it is in accord with correct conclusions.

Know v. Metropolitan Elevated Ry. Co., affirmed without opinion in 128 N. Y. 625.

Error in improperly admitting parol evidence as to the scope of a written contract, disregarded on appeal.

Avery v. Starbuck, without opinion, 127 N. Y. 675.

A "finding of fact" will, for the purpose of upholding a judgment, be given the same effect as though so designated and classified in the report. *Berger v. Varrellmann*, 127 N. Y. 281.

No power on appeal to amend pleadings so as to conform to the proof exists for the purpose of reversing a judgment.

Trustees of Amherst College v. Ritch, 151 N. Y. 282.

The rule established in *Slocovich v. Orient. Mut. Ins. Co.*, 108 N. Y. 62, that the decision of a trial judge as to the competency of an expert witness will not be reversed, reiterated and applied.

Affirmed, *it seems*, without opinion, 128 N. Y. 624.

Case when a notice of appeal from the Board of Claims, that the board "erred in receiving evidence against the objection and exception of the claimant," is sufficient.

McDonald v. State, 127 N. Y. 18.

The appellate court cannot offset one error against another error, where no exception was taken, and no appeal was taken therefrom.

Monnet v. Merz, 127 N. Y. 151.

An order of the General Term of the Supreme Court affirming a judgment of conviction in the Court of Oyer and Terminer and

Appeal—Continued.

remitting all proceedings to the latter court, operates to restore the authority of such court. *People v. Hughes*, 137 N. Y. 29.
 When erroneous legal proposition contained in a hypothetical question to a juror on trial of a challenge resulting in his exclusion, is not ground for exception.

People v. Fanshawe, 137 N. Y. 68.

A ruling excluding evidence will not be reversed on appeal on a ground not taken upon the trial.

Matter of Bateman, 145 N. Y. 623.

Where the court voluntarily allows an exception to a ruling, a formal exception need not be taken.

Mitchell v. Turner, 149 N. Y. 39.

Where the General Term reverses a surrogate's decree on a question of fact, it must direct a trial by jury unless the case is shown to be one in which the court could properly take the facts from the jury and determine the question as one of law.

Matter of Laudy, 148 N. Y. 403.

Admissions of parties not given in evidence on the trial will not be received by the appellate court.

People ex rel. Manhattan R. Co. v. Barker, 146 N. Y. 304.

Upon reversal of a judgment for the plaintiff the General Term should not direct a final judgment for the defendant, unless it is clear that upon a new trial the plaintiff could not possibly recover.

Iselin v. Starin, 144 N. Y. 453.

Where the question as to what amount is due is one of fact upon which either party may demand a jury trial, the General Term has no power to add to the original judgment a sum which it finds from the evidence to be due. *Dayton v. Parke*, 142 N. Y. 391.

A case where the General Term, upon a reversal of a judgment in plaintiff's favor, has power to dismiss the complaint.

Brackett v. Griswold, 128 N. Y. 644.

Any further reasons for a new trial should be presented to the Supreme Court upon an application to modify its order. *Id.*

On reversing an order vacating a stay and denying a motion to change the place of trial in a criminal action, made on the ground that a fair and impartial trial could not be had, the Appellate Division should not aside an intermediate trial and conviction.

People v. McLaughlin, 150 N. Y. 365.

Where defendant urges a different ground on appeal than that used upon motion for nonsuit, it will not be considered.

Pratt v. Dwelling House Mut. Fire Ins. Co., 130 N. Y. 206.

3. What Questions Raised.

An objection to the admission of a copy of a mechanic's lien that "it is not properly certified," is not available upon appeal unless specific defect is pointed out.

Hunter v. Walter, affirmed on opinion below in 128 N. Y. 668.

Appeal—Continued.

Objections taken upon a reference of a special issue cannot, where the rulings are not brought before the court, be made the subject of review on appeal. *Drexel v. Pease*, 129 N. Y. 96.

Where the court in directing a verdict included the amount of tax bills for 1876–1877 with those for 1878–1879, and the charges for one of the last years and part of the others were due, a general exception does not enable the court to decide that the taxes for the earlier years should not have been included.

Wells v. Higgins, 132 N. Y. 459.

If the exception had been specific, opportunity would have been afforded for correction. *Id.*

A misdirection of the court which may have prejudiced a party cannot be disregarded on appeal.

Moore v. N. Y. Elev. R. R. Co., 130 N. Y. 523.

When properly excepted to, an error in receiving evidence can only be disregarded where it did no harm.

Jefferson v. N. Y. Elev. R. R. Co., 132 N. Y. 483.

Where no objection has been raised at a trial, a question which might have been raised under such objection cannot be raised on appeal.

Moffat v. Fulton, 132 N. Y. 507.

Objections not raised on trial cannot be considered on appeal. *Id.*

What questions cannot be raised for the first time on appeal.

Clason v. Baldwin, 152 N. Y. 204.

It is not legal error to permit a medical expert who has personally examined the person for the purpose of determining his mental condition at the time of the examination to give his opinion, without disclosing particular facts on which he bases his opinion.

People v. Youngs, 151 N. Y. 210.

Exceptions to rulings on examination of proposed jurors presents no question for review, when the juror whose competency was questioned did not sit.

People v. Scott, 153 N. Y. 40.

On appeal, defects which if pointed out during the trial might have been obviated cannot be raised. *Brady v. Nally*, 151 N. Y. 258.

An exception is necessary to raise the question that a finding is unsupported by evidence.

Turner v. Weston, 133 N. Y. 650.

The exception must indicate clearly what fact is challenged. *Id.*

An exception to the introduction of evidence as to plaintiff's income from his business before and after the injury, based solely upon the ground that the allegation in the complaint was too short to admit proof of special damages, is not available on appeal. *Frobisher v. Fifth Avenue Transp. Co.*, 151 N. Y. 431.

The right to object to evidence is waived either where no objection is made when evidence is offered or where no motion to strike out is made.

Brady v. Nally, 151 N. Y. 258.

If an affidavit on information and belief is insufficient, a question of law is presented for review on appeal.

Murphy v. Jack, 142 N. Y. 215.

Appeal—Continued.

Where a finding is not excepted to, it will be assumed that no objection was offered to the evidence.

Ashton v. City of Rochester, 133 N. Y. 187.

The court will not assume the existence of a fact where the testimony is conflicting.

Hollister v. Mott, 132 N. Y. 18.

An objection not taken by answer nor at trial is not available.

Buffalo Stone and Cement Co. v. Delaware, Lackawanna & Western R. R. Co., 130 N. Y. 152.

The erroneous ruling of trial court will not be presumed, but must be shown.

Sallade v. Gerlach, 132 N. Y. 548.

A finding in favor of contractors will be presumed to be in support of lienors who stood in place of the former.

Thomas v. Stewart, 132 N. Y. 580.

Remarks of a judge not containing any erroneous rule of law are not reviewable.

Connors v. Walsh, 131 N. Y. 590.

Notice of appeal from a decree of a surrogate, "from the decree and each and every part thereof," raises questions of fact.

Matter of Stewart, 135 N. Y. 413.

The rule applied in actions tried by jury, that a motion for a new trial is necessary to enable the General Term to review the facts, does not apply to the case of a trial before a surrogate.

Id.

After the direction of a verdict, if the court on motion sets it aside and grants a new trial and the order is appealed from, the facts are not before the General Term for the purpose of determining the preponderance of evidence, but the only question is whether there is evidence to go to the jury.

Hastings v. Brooklyn Life Ins. Co., 138 N. Y. 473.

Case where a finding of an essential fact will be presumed, where the evidence warranted it.

Powers v. Clark, 127 N. Y. 417.

Upon appeal from a surrogate's decree, errors in the admission or rejection of evidence may be disregarded if they could have no influence upon the case.

Matter of Miner, 146 N. Y. 121.

An objection which could have been obviated if taken on the trial cannot be raised for the first time on appeal.

Mayor v. New York Refrigerating Construction Co., 146 N. Y. 210.

An objection to defects in the proofs as to the service of an attachment cannot be raised for the first time on appeal.

Flandrow v. Hammond, 148 N. Y. 129.

Unless so regarded on trial, hearsay evidence will not be deemed sufficient proof on appeal.

Dayton v. Parke, 142 N. Y. 391.

An objection that a paper introduced in evidence was made with view to a settlement cannot be raised for the first time on appeal.

Gillies v. Manhattan Beach Improvement Co., 147 N. Y. 420.

Appeal—Continued.

An objection that there was a variance between the pleading and proof cannot be taken for the first time on appeal. *Id.*

An objection that plaintiff had an adequate remedy at law cannot be raised for the first time on appeal.

Wakeman v. Wilbur, 147 N. Y. 657.

An exception to the denial of a motion for a new trial does not enable the party to argue on appeal a point not taken on the trial.

Warner v. City of Rochester, 149 N. Y. 563.

Where the complaint is dismissed at the close of plaintiff's evidence on a reference and the plaintiff excepts to such ruling, such exception is sufficient to present the question whether plaintiff failed to establish a cause of action.

Raabe v. Syuier, 148 N. Y. 81.

An error in the admission of evidence is cured where the court subsequently strikes it out and directs the jury to disregard it.

People v. Schooley, 149 N. Y. 99.

The determination by the jury, upon conflicting evidence of the question as to whether or not certain representations as to the genuineness of certificates of its stock were made by a corporation, is conclusive.

Jarvis v. Manhattan Beach Co., 148 N. Y. 652.

The General Term of the Supreme Court, on appeals from probate decrees, has the same power as the surrogate to determine the facts.

Matter of Landy, 148 N. Y. 403.

4. Judgment on.

The fact that a referee awarded upon a claim for services a less sum than the amount fixed by plaintiff's witnesses in answer to a hypothetical question, defendant having given no evidence upon the subject, does not show disregard of evidence or require a reversal of his finding on appeal.

Collier v. Rutledge, 136 N. Y. 621.

An order giving leave to appeal to the Court of Appeals in a case where the matter in controversy is less than \$500, which does not give the reason for allowing, is insufficient.

Squire v. McDonald, 138 N. Y. 554.

Where it appears upon appeal that parties essential to complete determination of case have not been brought in, the court will reverse the judgment, although the defect of parties is not raised by defendant's pleading.

Moulton v. Cornish, 138 N. Y. 133.

The effect of judgment absolute on appeal is to admit the whole of plaintiff's action, and the only question remaining is to decide amount of damages.

Bossout v. Rome, Watertown, etc., R. R. Co., 131 N. Y. 37.

On conflict of evidence, a verdict for plaintiff should be sustained.

Conde v. Wiltsie, 131 N. Y. 647.

Upon reversal of an order vacating an attachment, a creditor may

Appeal—Continued.

maintain an action against junior creditors for money received from sheriff. *Haebler v. Meyers*, 132 N. Y. 363.

A judgment rendered upon exceptions heard at General Term in the first instance is a General Term judgment.

Martin v. Platt, 131 N. Y. 641.

No appeal can lie therefrom to the General Term. *Id.*

But one might have been taken to the Court of Appeals. *Id.*

A discretionary order of Special Term may be reviewed by the General Term.

Bossout v. Rome, Watertown, etc., R. R. Co., 131 N. Y. 37.

The General Term, when it finds error in part of a judgment requiring a reversal of such part, may reverse the whole judgment, and such reversal will not be interfered with upon appeal.

Gray v. Manhattan Ry. Co., 128 N. Y. 499.

Erroneous admission of evidence of offer, when not ground for reversal. Damages for depreciation of property. Effect of payment on an injunction.

Lawrence v. Metropolitan Elevated Ry. Co., affirmed 126 N. Y. 483.

Upon appeals by both parties from judgment for damages, plaintiff claiming it to be inadequate and defendant that it is excessive, the General Term has no authority to affirm as to one appeal and reverse as to the other.

National Board of Marine Underwriters v. National Bank of the Republic, 146 N. Y. 64.

Where a judgment is vacated pending an appeal therefrom, the appeal should be dismissed. *Duryea v. Fuechsel*, 145 N. Y. 654.

Upon the reversal of a conviction on the ground that the verdict was against the weight or that justice required a new trial, the defendant should not be discharged, but a new trial should be ordered.

People v. Camp, 139 N. Y. 87.

The General Term can withhold an injunction and leave plaintiff to his remedy at law unless damages are substantial.

Gray v. Manhattan Ry. Co., 128 N. Y. 499.

When damages by way of costs will not be awarded upon affirmation of a judgment for plaintiff on a second appeal.

Blazy v. McLean, 146 N. Y. 390.

Upon the modification of a surrogate's decree, the General Term has discretionary power to determine whether the appellant shall be allotted costs in the Surrogate's Court, and the Court of Appeals has no jurisdiction to review such discretion.

Matter of Denton, 137 N. Y. 428.

It is within the discretion of the General Term to grant a motion to dismiss the appeal because of failure to serve printed copies of appeal papers, and the exercise of this discretion is not reviewable in the Court of Appeals.

Wetmore v. Wetmore, 137 N. Y. 623.

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Where the findings of the trial court justify the judgment, the General Term cannot reverse on questions of law only.

Cudahy v. Rhinehart, 133 N. Y. 248.

Where both parties appeal, a reversal of defendant's appeal is legally an affirmance of plaintiff's appeal. *Id.*

A reversal of defendant's appeal only entitles plaintiff to restoration of the judgment of trial court. *Id.*

II. TO COURT OF APPEALS.**1. What Appealable and What Not Appealable.**

In the absence of a statement in the order of the General Term reversing a judgment and granting a new trial, that the reversal was upon questions of law only, the Court of Appeals will not review. *Cooke v. Underhill Mfg. Co.*, 138 N. Y. 610.

An exception taken to the denial by the trial judge of a motion for a new trial upon his minutes, not being taken during the trial but after its completion, presents no question for review in the Court of Appeals.

Gridley v. College of St. Francis Xavier, 137 N. Y. 327.

The refusal of the trial court to permit an amendment of the answer on the trial is not reviewable in the Court of Appeals.

Coffin v. Grand Rapids Hydraulic Co., 136 N. Y. 655.

Where plaintiff recovered a judgment, but the General Term ordered a new trial, he could not on appeal from that order avail himself of errors in ruling against him on the trial.

Cooke v. Underhill Mfg. Co., 138 N. Y. 610.

Where there is no exception to any finding of fact by the referee or to the refusal to find any fact, the Court of Appeals cannot review any finding or refusal.

Donovan v. Clark, 138 N. Y. 631.

Findings of a referee upon conflicting evidence are, after affirmance by the General Term, not reviewable in the Court of Appeals.

Crim v. Starkweather, 136 N. Y. 635.

Where there is conflicting evidence with respect to a disputed fact arising upon a motion, it is the province of the court in which the motion is made to settle the conflict, and the Court of Appeals will not interfere with the result.

Taylor v. Granite State Provident Asso., 136 N. Y. 343.

The Court of Appeals has no power to review a verdict for excessive damages.

Link v. Sheldon, 136 N. Y. 1.

An objection that the application for a review on *certiorari* of an assessment for taxation was not made within thirty days after notice thereof, will not be first heard in the Court of Appeals.

People ex rel. Harlan & Hollingsworth Co. v. Campbell, 139 N. Y. 68.

Where the comptroller received affidavits without objection instead of requiring the witnesses to be produced for examination,

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- he could not be heard to object to the competency of the evidence. *Id.*
- Appellant has the right within the statutory time for appealing to take and perfect another appeal where former undertaking on appeal was withdrawn. *Culliford v. Gadd*, 135 N. Y. 632.
- An appeal from so much of an order as awards a new trial is ineffectual unless accompanied by a stipulation for judgment absolute. *Matter of Valentine*, 136 N. Y. 623.
- Order of General Term, granting power to elevated road to construct an approach to bridge, is discretionary, and no appeal therefrom lies to Court of Appeals.
- Matter of East River Bridge Co.*, 143 N. Y. 249.
- Court of Appeals has no jurisdiction to review discretion of General Term allowing costs in Surrogate's Court.
- Matter of Denton*, 137 N. Y. 428.
- Nor the discretion of General Term in granting order to dismiss appeal for failure to serve printed copies of appeal papers.
- Wetmore v. Wetmore*, 137 N. Y. 623.
- The Court of Appeals may, on appeal from decision of General Term, pass upon the question of the legal right of court below to grant an extra allowance.
- Hanover Fire Ins. Co. v. Germania Fire Ins. Co.*, 138 N. Y. 252.
- An award of appraisers in condemnation proceedings, after confirmation by the General Term, is not reviewable in the Court of Appeals. *Matter of N. Y. & Brooklyn Bridge*, 137 N. Y. 95.
- The action of the General Term may be the subject of review. *Id.*
- The discretion of the Supreme Court in relieving a purchaser at foreclosure is not reviewable in the Court of Appeals.
- Crocker v. Collner*, 135 N. Y. 662.
- Court of Appeals will assume that the appeal from the order was valid, and therefore reviewable before it when record does not contain proper objections.
- Whitmore v. Village of Tarrytown*, 137 N. Y. 409.
- The exercise of the discretion of the Special Term in appointing a receiver is not reviewable in the Court of Appeals.
- Dawson v. Parsons*, 137 N. Y. 605.
- Where the General Term in the exercise of its discretion refuses a new trial no appeal lies to the Court of Appeals.
- Kaare v. Troy Steel & Iron Co.*, 139 N. Y. 369.
- An appeal from the order of amendment of General Term to their original decision and from so much of the order of reversal as contained it brought up nothing to the Court of Appeals.
- Altman v. Hofeller*, 137 N. Y. 619.
- Where cause of action stated in the complaint involves a sum less than \$500, the Court of Appeals will examine a counter-claim, and if it could not be recovered will dismiss the appeal.
- Societa Italiana Di Beneficenza v. Sulzer*, 138 N. Y. 468.

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An order of the General Term affirming an order of the Special Term, granting a motion by plaintiff to discontinue an action for divorce brought by the husband upon payment of costs, is not reviewable in the Court of Appeals.

Moore v. Moore, 138 N. Y. 679.

The Court of Appeals has not jurisdiction to review the discretion of the Supreme Court in quashing a writ of *mandamus*.

People ex rel. Hasbrouck v. Supervisors of Dutchess, 135 N. Y. 522.

What judgment is not a final one appealable to the Court of Appeals.

Rich v. Manhattan Ry. Co., 138 N. Y. 668.

Where the conduct of the party applying for the writ has been such as to render it inequitable to grant him relief by *mandamus*, the Supreme Court may in its discretion deny the writ, and an appeal will not lie from the order of denial to the Court of Appeals.

People ex rel. Durant Land Improvement Co. v. Jeroloman, 139 N. Y. 14.

The Court of Appeals will not in such case look at the opinion of the General Term to discover the grounds on which the order was made.

Id.

If there is conflicting evidence as to whether the examination of a long account will be involved, the decision of the court below, ordering a reference, will not be reviewed in the Court of Appeals.

Cassidy v. McFarland, 139 N. Y. 201.

An order denying an application for the appointment of commissioners of appraisal, in proceedings to acquire the rights of abutting owners, is appealable to the Court of Appeals.

Matter of Metropolitan Elevated Ry. Co., 136 N. Y. 500.

The control possessed by courts of original jurisdiction over their judgments and orders, as well as in reference to the fact or the sufficiency of a notice of appearance in the action, is absolute and beyond review in the Court of Appeals.

Mayor, etc., of N. Y. v. Smith, 138 N. Y. 676.

An action to recover the deposit made on a purchase of lands and expense of examination of title, on the ground that the vendor's title was defective, does not affect the title to real property so as to permit an appeal to the Court of Appeals.

Miele v. Deperino, 135 N. Y. 618.

The Court of Appeals cannot review the finding of the jury upon facts.

People v. Trimble, 131 N. Y. 118.

The Court of Appeals cannot review exercise of discretion, unless abused.

Bossout v. Rome, Watertown, etc., R. R. Co., 131 N. Y. 37.

The granting of a writ of *certiorari* under chapter 269 of 1880, to review an assessment at the instance of the taxpayer, is not dis-

Appeal—Continued.

cretionary, and an order of the General Term quashing the writ is appealable to the Court of Appeals.

Matter of Corwin, 135 N. Y. 245.

An order of reversal made on the ground that plaintiff had no legal right to maintain the action is reviewable by Court of Appeals. *Birge v. Berlin Iron Bridge Co.*, 133 N. Y. 477.

In reviewing an order of reversal the Court of Appeals takes the facts as set forth in the moving papers. *Id.*

An order of General Term granting a new trial, on ground that the verdict is against the evidence, is not a final order.

Baldwin's Bank of Penn Yan v. Butlers, 133 N. Y. 564.

Referee's discretion is not reviewable.

Wright v. Renssens, 133 N. Y. 298.

Motion to strike out immaterial evidence, no ground for reversal. *Id.*

Where a person applies at Special Term to be made a party to an action pending in Court of Appeals, which application is denied, the decision of General Term affirming the order of Special Term cannot be reviewed on appeal.

Brennan v. Hall, 131 N. Y. 160.

Where the amount in controversy is less than \$500, action is not appealable to Court of Appeals. *Id.*

An objection not clearly presented by exception and not apparent cannot be considered.

Mitchell v. Met. Elev. Ry. Co., 132 N. Y. 552.

An appeal does not lie from a decision of the Appellate Division in a proceeding against a husband for failure to support his wife.

People ex rel. Comrs. of Public Charities & Correction v. Cullen, 151 N. Y. 54.

A case in which a unanimous decision of the Appellate Division is not appealable under section 191 of the Code.

Huda v. American Glucose Co., 151 N. Y. 549.

The Court of Appeals will not review an order instructing the receiver of a corporation after the sale of its property.

Matter of Peekamose Fishing Club, 151 N. Y. 511.

An order quashing a writ of *certiorari* on the ground that the relator had no power to prosecute is reviewable in the Court of Appeals. *Forest Commission v. Campbell*, 152 N. Y. 51.

The amendment to section 191 of the Code, by chapter 559 of 1896, was a competent exercise of the legislative power.

Sciolina v. Erie Preserving Co., 151 N. Y. 50.

An application by the plaintiff's attorney to vacate a satisfaction of the judgment recovered by him is a special proceeding and not a motion, and an order of the Appellate Division affirming an order granting the application is appealable to the Court of Appeals. *Peri v. N. Y. C. & H. R. R. R. Co.*, 152 N. Y. 521.

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What is not of itself sufficient to warrant the granting of a certificate of an appeal to the Court of Appeals under section 191 of the Code; when the authority to grant such a certificate should be exercised. *Sciolina v. Erie Preserving Co.*, 151 N. Y. 50.

Counsel have no right to appeal in a capital case solely for the purpose of delay. *People v. Scott*, 153 N. Y. 40.

When an appeal will not lie to the Court of Appeals from an order denying a motion for a new trial in a capital case on the ground of newly-discovered evidence.

People v. Mayhew, 151 N. Y. 607.

The Court of Appeals will review an order to determine the status of a voter. *Matter of Gage*, 141 N. Y. 112.

Article 6, section 9 of the Constitution, that "no unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to support a finding of fact, shall be reviewed by the Court of Appeals," applies to special proceedings as well as to actions.

People ex rel. Manhattan R. Co. v. Barker, 152 N. Y. 417.

The fact of a unanimous judgment or order of affirmance by the Appellate Division is a decision that there is evidence supporting the findings of fact as expressed or necessarily implied.

Id.

Section 9, article 6 of the Constitution applies to a proceeding by *certiorari* under chapter 269 of 1880, to review an assessment for taxation; what questions may be reviewed upon appeal from such decision.

Id.

An order made on question of law is appealable.

White v. Inebriates' Home for Kings Co., 141 N. Y. 123.

An order of restitution permitting counsel fees and commissions is appealable. *Pittsfield Nat. Bank v. Bayne*, 140 N. Y. 321.

A decision of the surrogate to sell real property to pay debts may be reviewed at General Term, but no appeal lies to the Court of Appeals.

Kingsland v. Murray, 133 N. Y. 170.

Where an executor accepts a part commission and such allowance is approved by a surrogate and General Term, such determination will not be reviewed by Court of Appeals.

Matter of Hodgman, 140 N. Y. 421.

Court cannot review a void order unless it affects a substantial right.

De Lancey v. Piepgras, 141 N. Y. 88.

An order not affecting a substantial right not resting in discretion is not appealable.

Id.

An order requiring restoration of premises does not affect a substantial right.

Id.

The Court of Appeals can review the exceptions to evidence only.

Goodsell v. Western Union Tel. Co., 130 N. Y. 430.

The conclusion of the trial court, approved by General Term, is final.

Anthony v. Wise, 130 N. Y. 662.

Appeal—Continued.

The exercise of discretion of a referee at trial is not reviewable in Court of Appeals. *Barnes v. Brown*, 130 N. Y. 372.

A verdict rendered, subject to opinion of General Term, cannot be reviewed. *People v. Featherly*, 131 N. Y. 597.

The fact that the record did not contain any exception precluded its consideration. *Id.*

The Court of Appeals can review only questions of law raised by exceptions taken during trial.

Wicks v. Thompson, 129 N. Y. 634.

Report of referee, dismissing complaint, and not containing any finding of facts, is not reviewable.

Gilmour v. Prentice, 132 N. Y. 488.

Where the surrogate decides to remove a testamentary trustee upon any of the statutory grounds, the question resting in the discretion of the surrogate is reviewable by the General Term, but not by the Court of Appeals.

Matter of McGillivray, 138 N. Y. 308.

The order of a surrogate opening a decree of his court for fraud, which order has been affirmed by the General Term, is not reviewable on the facts by the Court of Appeals.

Matter of Flynn, 136 N. Y. 287.

An order made in a special proceeding before a surrogate and directing an executor to make and file an account is not a final order within section 190, subdivision 3 of the Code, and is not reviewable.

Matter of Callahan, 139 N. Y. 51.

A discretionary order where there has been no abuse of discretion is final in the Court of Appeals.

Matter of Peekamoose Fishing Club, 151 N. Y. 511.

Refusal of the court to issue a writ of peremptory *mandamus* on the relation of a corporation against the Commissioner of Public Works is not reviewable in the Court of Appeals.

People ex rel. N. Y. Underground Ry. Co. v. Newton, 126 N. Y. 656.

Jurisdiction of Court of Appeals to review a decision of the Supreme Court, rendered upon the report of commissioners, to appraise lands under the Rapid Transit Act, discussed and decided.

Matter of Metropolitan Elevated Ry. Co., 128 N. Y. 600.

The Court of Appeals cannot review a judgment of the General Term reversing upon the facts a decree of the surrogate, nor does an appeal from a subsequent judgment after such new trial bring up such order for review, under Code Civil Procedure, sections 1316, 1317.

Matter of Budlong, 126 N. Y. 423.

An order denying a motion for a new trial, involving the determination of a question of fact, is not, after affirmance by the General Term upon proofs adduced and the exercise of discretion, reviewable in Court of Appeals.

Randall v. Packard, 142 N. Y. 47.

Appeal—*Continued*.

Application of the rule in *Nostrand v. Knight*, 123 N. Y. 614, as to the review in the Court of Appeals of a decision of the General Term reversing a judgment upon the facts.

Phoenix Iron Co. v. Vessels "Hopatcong" and "Musconetcong," 127 N. Y. 206.

Who are parties aggrieved under Code Civil Procedure, section 1294, and not entitled to appeal to Court of Appeals.

Bryant v. Thompson, 128 N. Y. 426.

A judgment which determines questions between parties and orders an accounting, is interlocutory and not appealable to the Court of Appeals.

McKeown v. Officer, 127 N. Y. 687.

An order quashing a writ of *certiorari* issued under chapter 269, Laws 1880, to review an assessment of the personal property of a corporation for taxation, is appealable to the Court of Appeals.

People ex rel. Commercial Mut. Ins. Co. v. Tax Commissioners, 144 N. Y. 483.

A statement, in an order of General Term reversing an order denying a motion for a new trial, that such reversal is for errors of law only and not for errors of fact, is not reviewable by the Court of Appeals.

Mickee v. Walter A. Wood Mowing & Reaping Machine Co., 144 N. Y. 613.

Where it appears by the complaint that the plaintiff is entitled to equitable relief, the granting of an injunction *pendente lite* is discretionary, and no appeal lies therefrom to the Court of Appeals.

Castoriano v. Dupe, 145 N. Y. 250.

A motion for a new trial on the ground that a verdict for nominal damages was improper is not reviewable by the Court of Appeals.

Jung v. Keuffel, 144 N. Y. 380.

Order of the General Term reversing an order allowing an amendment of the complaint after trial is not reviewable in the Court of Appeals.

Sprague v. Cochran, 144 N. Y. 104.

A judgment is not reviewable in the Court of Appeals where the record shows that the amount in controversy was less than \$500.

Thacher v. Hope Cemetery Ass'n, 146 N. Y. 381.

In the absence of any proof or finding of substantial damage, a refusal to grant an injunction restraining the erection of a bay window beyond the street line will not be disturbed.

Wormser v. Brown, 149 N. Y. 163.

Appeal to Court of Appeals lies on part of next of kin where the executor applies for taxation of appraiser's fees after the same have been paid by him.

Matter of Harriot, 145 N. Y. 540.

To authorize the Court of Appeals to review, on an appeal from an affirmance of a final judgment, a prior affirmance by the General Term of an interlocutory judgment, the notice of appeal

Appeal—Continued.

must specify such judgment and thus express appellant's election to have it reviewed.

Rich v. Manhattan R. Co., 150 N. Y. 542.
An appeal will not lie to the Court of Appeals from an order of General Term reversing, on the law, an order denying a motion for a new trial in an action tried by jury, where there was a conflict of evidence.

Hoes v. Edison General Electric Co., 150 N. Y. 87.
An order denying a motion for a new trial on the ground of newly-discovered evidence is not reviewable by the Court of Appeals.

White v. Benjamin, 150 N. Y. 258.
An appeal will not lie to the Court of Appeals from an order confirming the report of commissioners in condemnation proceedings either for error of law or fact.

Matter of Brooklyn El. R. R. Co., 147 N. Y. 344.
An objection that the commissioners considered a tract of land with three separate buildings as three parcels instead of as a whole presents a question of law.

Id.
An exception to the denial of a motion for nonsuit on the ground of insufficiency of the proof of defendant's negligence presents no question of law which can be reviewed by the Court of Appeals.

Szuchy v. Hillside Coal & Iron Co., 150 N. Y. 219.
An order refusing to allow a person to be brought in as a party in *mandamus* proceedings is a discretionary one, and is not appealable to the Court of Appeals.

Matter of Bohnet v. Mayor, 150 N. Y. 279.
An order made in an action for dissolution of a corporation, upon application by a creditor, directing the permanent receiver to pay such creditor's claim, is not appealable as of right to the Court of Appeals.

People v. American Loan & Trust Co., 150 N. Y. 117.
An action to recover damages for injury to real property by diversion of an alleged natural stream of watercourse is not an action affecting the title to real property, and an appeal to the Court of Appeals would not lie.

Hill v. Board of Water Comrs., 150 N. Y. 547.
An order denying a motion for a new trial on the ground of newly-discovered evidence, which states as the reason for such denial that the action was prematurely brought, is final and is reviewable in the Court of Appeals.

Whitney v. Davis, 148 N. Y. 256.
An order of General Term reversing an order affirming an award of commissioners appointed in a proceeding by a land owner to recover compensation for land taken for public use and dismissing the proceeding is appealable to the Court of Appeals.

Matter of Clark v. Water Comrs. of Amsterdam, 148 N. Y. 1.

Appeal—Continued.

The jurisdiction of the Court of Appeals cannot be changed or enlarged by the stipulation of parties.

Hoes v. Edison General Electric Co., 150 N. Y. 87.

An appeal may be taken to the Court of Appeals as matter of right in an action commenced in any of the late superior city courts.

Halliburton v. Clapp, 149 N. Y. 183.

A judgment of the General Term reversing upon the facts a judgment of a Court of Sessions, under section 343 of Penal Code, is not appealable.

People v. Mitchell, 142 N. Y. 639.

Competency of juror is a question of fact and cannot be reviewed by Court of Appeals.

People v. McGonegal, 136 N. Y. 62.

The Court of Appeals cannot review the discretion of the trial court as to measure of punishment, which is within the statute.

Id.

Erroneous statements of law in the charge or improper comments on the facts or evidence in a capital case, if prejudicial to the defendant, may be reviewed or corrected by the Court of Appeals although no exception was taken.

People v. Barberi, 149 N. Y. 256.

Where a first award in condemnation proceedings has been set aside and another hearing had, an appeal does not lie from an order of the General Term affirming an order confirming the second report.

Matter of Southern Boulevard R. R. Co., 141 N. Y. 532.

The evidence may be referred to to ascertain whether the amount in controversy is sufficient to allow an appeal to the Court of Appeals.

Blake v. Krom, 128 N. Y. 64.

When an appeal to the Court of Appeals should have been dismissed because damages did not amount to \$500.

Id.

On appeal to the Court of Appeals, party could not insist that his demand was larger than was stated in the pleading.

Id.

A final order in special proceedings affecting a substantial right is appealable.

Matter of King, 130 N. Y. 602.

The Court of Appeals has no power to review an order of reversal of the Appellate Division, granting a new trial on an exception to the decision of the court or referee, where there is a material and controverted question of fact.

Otten v. Manhattan R. Co., 150 N. Y. 395.

The constitutional prohibition against the review by the Court of Appeals of an unanimous decision of the Appellate Division has no application to an appeal in a case which involved upon a question of law.

Matter of Green, 153 N. Y. 223.

Where the appeal is taken from a judgment of affirmance of the General Term, the Court of Appeals may review an essential finding of fact made without the support of any evidence.

Matter of Rogers, 153 N. Y. 316.

Section 20 of chapter 601, Laws 1895, authorizing the Court of

Appeal.—*Continued.*

Appeals to review an order convicting a party as a disorderly person is not unconstitutional.

People ex rel. Commissioners of Charities v. Cullen, 153 N. Y. 629.

Appeals are not allowed to this court for the purpose of settling abstract questions. *Id.*

An appeal does not lie to the Court of Appeals unless the party appealing has an interest in the controversy. *Id.*

Right of party depends only upon express statutory permission.

Bryant v. Thompson, 128 N. Y., 426.

The court will not review in the same case a prior decision by Second Division after a full argument and consideration.

Cluff v. Day, 141 N. Y. 580.

An appeal may be taken to the Court of Appeals from an order dismissing a writ of certiorari for want of jurisdiction.

People ex rel. O'Connor v. Board of Supervisors of Queens Co., 153 N. Y. 370.

A finding of fact is conclusive on the Court of Appeals if there is no evidence to support it. *La Rue v. Smith*, 153 N. Y. 428.

All evidence necessary to support a judgment must be deemed to have been found where both parties request direction of a verdict. *Bowery Bank v. Gerety*, 152 N. Y. 411.

An order denying a motion for a new trial made in a criminal case upon the ground of newly-discovered evidence is not reviewable in the Court of Appeals. *People v. Trezza*, 128 N. Y. 529.

Such an order is not reviewable in the Court of Appeals. *Id.*

The right of appeal in criminal cases is statutory only. *Id.*

Neither a writ of error nor *certiorari* before the abolishment of this remedy by the Code of Criminal Procedure, section 517, would bring up such order for review. *Id.*

Where the action was one for an injunction, and the judgment in favor of defendant leaves plaintiff and his sureties liable upon the undertaking for a large amount, the Court of Appeals will not refuse to entertain the appeal.

Williams v. Montgomery, 148 N. Y. 519.

The Court of Appeals, as a general rule, deals with questions of law only, and it cannot review an exercise of the discretion of the General Term in criminal cases.

People v. Most, 128 N. Y. 108.

The Court of Appeals cannot consider a question that the jury were prejudiced by offers of evidence persistently made by the prosecuting officers and repeatedly overruled. *Id.*

The only authority now existing for an appeal to the Court of Appeals in a special proceeding is Code Civ. Pro. § 190, subd. 3.

Matter of Southern Boulevard R. R. Co., 128 N. Y. 93.

The orders mentioned in section 190, subdivision 2, are orders made in the action and affecting a substantial right. *Id.*

Appeal—Continued.

The provisions of section 1361 of the Code do not apply to appeals to the Court of Appeals. *Id.*

The right of a client to invoke the power of the court to compel his attorney to pay over money is in the discretion of the court and is not reviewable.

Schell v. Mayor, etc., of N. Y., 128 N. Y. 67.

The Court of Appeals cannot review an order where the ground of reversal by the General Term was not the want of power to grant the relief sought. *Id.*

A reversal by the General Term which may have been made upon the facts, or may not, cannot be reviewed upon appeal.

Williams v. Delaware, Lackawanna, etc., R. R. Co., 127 N. Y. 643.

In such a case the order is not appealable, unless it appears that the court passed on the facts unfavorably to appellant. *Id.*

2. What Questions Raised.

The court is not authorized to look into the evidence for the purpose of reversing findings of fact and law to which no exceptions are taken.

Excelsior Brick Co. v. Village of Haverstraw, 142 N. Y. 146.

A reversal by the General Term that the finding of negligence by a court or referee is not justified by the evidence will not be interfered with by the Court of Appeals, when it can be fairly said that the finding was against the weight of evidence.

Bloom v. Nat. United Benefit Savings & Loan Co., 152 N. Y. 114.

The Court of Appeals is at liberty to gather from the evidence any needed fact, such as could have been sustained if it had been actually found, in support of a referee's judgment.

Ogden v. Alexander, 140 N. Y. 356.

In order to enable the Court of Appeals to review rulings of a referee in allowing particular items of damage, all the facts bearing upon the legality of the disputed items should be found or the questions presented by some specific request to find.

Scott v. Haverstraw Clay & Brick Co., 135 N. Y. 141.

A case in which it will be deemed on appeal to the Court of Appeals that all the facts warranted by the evidence and necessary to support the judgment have been found.

Trustees of Amherst College v. Ritch, 151 N. Y. 282.

Upon appeal from an order of the General Term affirming surrogate's decree settling accounts of executors, only questions of law can be considered. *Matter of Bolton*, 141 N. Y. 554.

Questions of law only are raised in Court of Appeals where the General Term reverses a judgment on the exceptions, and affirms on the facts an order denying a motion for a new trial on the minutes. *Edgecomb v. Buckhout*, 146 N. Y. 332.

Appeal—Continued.

What facts do not require an interference with a contrary finding by the Court of Appeals.

Cohn v. Metropolitan Elevated Ry. Co., 136 N. Y. 646.

Under the provisions of Code Criminal Procedure, authorizing the Court of Appeals in a capital case to grant a new trial whether exceptions were taken or not, the evidence given on the trial should be examined in the Court of Appeals in order to determine whether injustice had been done.

People v. Waymann, 128 N. Y. 585.

Upon an appeal to the Court of Appeals in proceedings to assess damages caused by the diversion of waters, only questions of law are brought up for review.

Matter of Thompson, 127 N. Y. 463.

The action of the trial judge in changing and resettling his findings after an appeal has been taken from the judgment entered thereon cannot be reviewed by the Court of Appeals on an appeal from the judgment, where such action is not embodied in any order of judgment.

Bigelow v. Davol, 150 N. Y. 327.

An exception to a conclusion of law is not available on appeal, where the conclusion follows and is in accordance with the findings of fact, to which no exception was taken.

Riendeau v. Bullock, 147 N. Y. 269.

An exception to a ruling allowing a party to inquire of jurors whether the fact that his principal witness has served a term of imprisonment would prejudice them against believing him is not available on appeal.

Carlson v. Winterson, 147 N. Y. 652.

Where the order and judgment below are silent as to their grounds, its opinion cannot be considered by the Court of Appeals, as it is no part of the record.

Randall v. New York El. R. R. Co., 149 N. Y. 211.

Usually statements in the opinions of the courts below cannot be considered by the Court of Appeals.

Koehler v. Hughes, 148 N. Y. 507.

No fact can be considered by the Court of Appeals for the purpose of reversing a judgment unless it appears in the findings or was requested to be found on uncontroverted evidence.

Id.

Where it is not shown that the verdict is against the weight of evidence or was influenced by mistake, error or prejudice, the determination of the jury on the question of insanity in a capital case will be regarded as conclusive by the Court of Appeals.

People v. Hoch, 150 N. Y. 291.

The power of the Court of Appeals to order new trials in capital cases, although no exception is taken, is not called into exercise by the appearance of some error in the conduct of the case, unless some substantial rights of the accused were affected by it.

Id.

When proof is defective which is capable of being supplied, and

Appeal—Continued.

no question is raised on the trial, the court will assume that proof of the omitted fact was waived, or that the fact as to which the proof was defective was conceded.

Bliss v. Suckles, 142 N. Y. 647.

Error in the admission of testimony of neighboring property owners as to rents received for their property is not available on appeal.

Randall v. New York El. R. R. Co., 149 N. Y. 211.

When questions excluded upon objection, a ground for reversal considered. *Stouter v. Manhattan Ry. Co.*, 127 N. Y. 661.

The introduction of a map of the accident which shows an addition to the railroad tracks since accident is objectionable. *Id.*

On appeal from an order of General Term disbaring an attorney, questions of fact arising on conflicting evidence cannot be reviewed. *Matter of Ryan*, 143 N. Y. 528.

An appeal certified under section 190 of the Code brings up only the questions which were certified.

Grannan v. Westchester Racing Ass'n, 153 N. Y. 449.

A question certified by the Appellate Division should be a distinct proposition of law. *Id.*

The Court of Appeals has no jurisdiction to review the discretion of the court below. *Shiels v. Wortmann*, 126 N. Y. 650.

What will not authorize the Court of Appeals to review an order. *Id.*

The mere intimation of an opinion by the judge upon the evidence, or upon the merits of the case, or his comments upon the evidence, furnish no ground for a reversal in the Court of Appeals.

Hurlburt v. Hurlburt, 128 N. Y. 420.

When the Court of Appeals can only review errors of law brought up on proper exceptions. *Id.*

Where the General Term reverses an order, confirming the report of commissioners to appraise lands, the order of reversal stands.

Matter of Southern Boulevard R. R. Co., 128 N. Y. 93.

An order of reversal in the special proceeding was not appealable to the Court of Appeals. *Id.*

Upon appeal to the Court of Appeals from an order of General Term affirming an order, quashing a writ of *certiorari* to review an assessment, the court will only review as questions of law any improper and illegal elements as a basis for such valuation.

People ex rel. Western Union Tel. Co. v. Dolan, 126 N. Y. 166.

The determination of the General Term in such a case is an order, and the appeal from it will not lie from it to the Court of Appeals. *Id.*

3. Practice.

Motion for a re-argument in the Court of Appeals made on the

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ground that there was an error in the record consisting of a misstatement of the finding of a referee, denied.

Burt v. Oneida Community, 138 N. Y. 649.

When the Court of Appeals will not grant a re-argument of an appeal determined in the Second Division of that court upon a question claimed to have been overlooked.

People v. Ballard, 136 N. Y. 639.

The Court of Appeals may exercise the jurisdiction of the General Term upon motion for a new trial under section 1001 of the Code, after entry of an interlocutory judgment directed trial of an issue of fact by the court or a referee.

Fischer v. Blank, 138 N. Y. 669.

An appeal should be dismissed when a decision thereon could have no practical effect. *Matter of Manning*, 139 N. Y. 446.

Where delay of a year in making a tender was not set up as a defense in the answer nor urged at the trial, *held*, that the Court of Appeals would assume it was explainable in a way not to defeat plaintiff's right of recovery.

Duncan v. N. Y. Mut. Ins. Co., 138 N. Y. 88.

Upon appeal to the Court of Appeals from the entire rejection of a claim, the right to recover some sum must conclusively appear in order to raise a question of law, or there must have been some material and erroneous ruling adverse to the claimant, which prejudiced him in the prosecution of his case.

Spencer v. State, 135 N. Y. 619.

The Court of Appeals will not pass upon the power of the legislature to enact a given statute unless it be necessary in order to determine questions in the record.

Curtain v. Barton, 139 N. Y. 505.

An exception cannot be made for the first time in the Court of Appeals.

People v. Formosa, 131 N. Y. 478.

When power of the Court of Appeals to order a new trial in capital cases will be exercised.

People v. Constantino, 153 N. Y. 24.

An affirmance by the General Term of the finding as to whether a transaction was a sale of securities or a loan at usurious interest with collateral cannot be disturbed by the Court of Appeals.

Standen v. Brown, 152 N. Y. 128.

The Court of Appeals has no power to set aside a verdict when contrary to evidence.

Felska v. N. Y. C. & H. R. R. R. Co., 152 N. Y. 339.

When two actions for penalties based upon alleged violation of two distinct ordinances are tried together upon the same evidence, and general judgment is rendered in each case, it is not the province of the Court of Appeals to separate what is legal from what is illegal.

City of Buffalo v. N. Y., L. E. & W. R. R. Co., 152 N. Y. 276.

Appeal—Continued.

The court will take cognizance only of exceptions appearing in the record. *People v. Brooks*, 131 N. Y. 321.

Although exceptions may not have been taken in the court below, the Supreme Court may grant a new trial on a judgment against the weight of evidence, or against law. *Id.*

Where the conviction on the trial for homicide was a lower grade than murder in the first degree, the Court of Appeals has not power to review the facts. *People v. Ledwon*, 153 N. Y. 10.

The courts of this state will determine an action upon an *ultra vires* corporation contract of another state according to the law of this state. *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24.

When the Court of Appeals cannot interfere with an award of the Court of Claims on the ground of insufficiency of the award. *Slavin v. State*, 152 N. Y. 45.

On a certificate by the Appellate Division under section 190 of the Code of the question of law whether the Supreme Court has jurisdiction of the action of an injunction which it has refused to entertain, the Court of Appeals cannot determine whether the Supreme Court might in its discretion have declined to entertain jurisdiction. *Davis v. Cornue*, 151 N. Y. 172.

When the Court of Appeals will not disturb a verdict of murder in the first degree. *People v. Conroy*, 153 N. Y. 174.

The burden of showing that the decision of the Appellate Division was unanimous rests on the moving party, and he cannot base such proof on the opinion. *Kaplan v. New York Biscuit Co.*, 151 N. Y. 171.

The Court of Appeals may require county clerk to furnish literal copies of stenographer's minutes taken in a capital case. *People v. Conroy*, 151 N. Y. 543.

In order to sustain a reversal by the General Term in the Court of Appeals of the decision of referee upon the facts, it must appear that his conclusions were erroneous. *Barnard v. Gantz*, 140 N. Y. 249.

Motion for re-argument not allowed where counsel had order of General Term amended, stating that reversal was on the facts, after decision by the Court of Appeals. *Cudahy v. Rhinehart*, 133 N. Y. 675.

The findings of a referee upon conflicting evidence are not to be disturbed. *Porter v. Dunn*, 131 N. Y. 314.

Upon an appeal from the judgment record alone where a partnership agreement was relied upon, the Court of Appeals could not, in the absence of a finding, assume that the general powers to be implied from the provisions set forth were regulated, limited or restricted by some subsequent provision in the agreement, in order to sustain the decision. *Rumsey v. Briggs*, 139 N. Y. 323.

Motion for a re-argument upon the ground that the opinion of the

Appeal—*Continued.*

court declared certain securities to be valueless where the referee had refused so to find, and the expression would not conclude the party on a new trial, denied.

Griggs v. Day, 137 N. Y. 542.

The court will look into the evidence to see if it supports a finding and not to reverse a judgment.

Ostrander v. Hart, 130 N. Y. 406.

An admission to find facts claimed by the unsuccessful party can only be taken advantage of by an exception to a refusal to find as requested. *Id.*

An appeal to the Court of Appeals from a conviction in a capital case stays the judgment of death only.

People v. Trezza, 128 N. Y. 529.

When a motion for a re-argument will be granted by the Court of Appeals. *Fosdick v. Town of Hempstead*, 126 N. Y. 651.

When a motion for an affirmance or to dismiss an appeal to the Court of Appeals, on the ground that only the same questions are involved as have been recently passed on in other cases in the court, will not be granted. *Clark v. Claflin*, 128 N. Y. 610.

Case when the decision of the Second Division of the Court of Appeals on the first appeal should stand as the law of the case on the second appeal, which was heard in the First Division of the court. *Todd v. Union Dime Savings Inst.*, 128 N. Y. 636.

Upon an appeal to the Court of Appeals, the cause must be heard upon the same record as that before the General Term.

People v. Dewey, 128 N. Y. 606.

The objection that the judgment appealed from is interlocutory may be raised and decided upon the main appeal.

McKeown v. Officer, 127 N. Y. 687.

Case where an appellant will not be denied the right to withdraw his appeal to the Court of Appeals, and discontinue the litigation.

Rector, etc., of Holy Trinity Ch. v. Rector, etc., of Church of St. Stephens, 128 N. Y. 604.

The Court of Appeals, in exercising the jurisdiction conferred by Code Criminal Procedure (§ 528) in capital cases, is governed by the practice regulating the review of questions of fact upon appeal to the Supreme Court in such cases.

People v. Taylor, 138 N. Y. 398.

Single expressions in a charge in a criminal case cannot be separated from the context as if they were independent propositions.

Id.

Chapter 559, Laws 1896, approved May 12, 1896, amending section 191 of the Code so as to prohibit appeals to the Court of Appeals from judgments in actions for personal injuries where the decision of the Appellate Division was unanimous, will, in the absence of proof as to the hour of such approval, be pre-

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sumed to have taken effect at the commencement of the day of approval, and to bar an appeal from such a judgment entered on the afternoon of said day.

Croveno v. Atlantic Ave. R. R. Co., 150 N. Y. 526.

Where the evidence which appears to be in conflict is but a mere scintilla, or is met by well-known and scientific facts as to which there is no conflict, the Court of Appeals may reverse the decision of the General Term.

Hudson v. R. W. & O. R. R. Co., 145 N. Y. 408.

The Court of Appeals has no power to weigh the evidence and determine its preponderance, but where there is a substantial failure of evidence to sustain the determination, it may review and reverse.

People ex rel. Coyle v. Martin, 142 N. Y. 352.

A party cannot insist that an original judgment entered upon the referee's report was correct on appeal to Court of Appeals where General Term modified the judgment and the party accepted the modified judgment.

Lawrence v. Church, 128 N. Y. 424.

Held, also, that the privilege of suing again allowed to plaintiff was beyond the power of the court to grant.

Id.

Error cannot be founded on a refusal to find, unless it appears not only that evidence was given proving the fact, but also that it was uncontroverted.

Koehler v. Hughes, 148 N. Y. 507.

Where the order of reversal by the General Term contains no statement to the contrary, the Court of Appeals must presume that the judgment was not reversed on any question of fact.

Blashfield v. Empire State Telephone & Telegraph Co., 147 N. Y. 520.

The Court of Appeals, in reviewing the evidence in a capital case, is governed by the practice regulating appeals to the Supreme Court in dealing with questions of fact.

People v. Lippy, 128 N. Y. 629.

Usually the findings of the jury on disputed evidence must be taken as conclusive.

Id.

The Court of Appeals cannot, in a capital case, disregard any valid exception taken by the defendant.

People v. Corey, 148 N. Y. 476.

The rule that an error which did not prejudice the complaining party will be overlooked is only applicable when the error could by no possibility have produced injury.

People v. Altman, 147 N. Y. 473.

A question certified to the Court of Appeals can only be reviewed by it upon an appeal from the judgment or order which decided such questions.

Bank of the Metropolis v. Faber, 150 N. Y. 200.

On motion to dismiss an appeal to the Court of Appeals on the ground that the Appellate Division unanimously decided that

Appeal—Continued.

there was evidence supporting the finds, the moving party should furnish the court with a copy of the record.

Hutchinson v. Root, 153 N. Y. 239.

So far as the facts found and questions determined are identical, the court will follow the decision of the Second Division.

Mygatt v. Coe, 142 N. Y. 78.

An application to compel an attorney to deliver over papers to his attorney should be made in the court of original jurisdiction.

People ex rel. Hoffman v. Board of Education of New York, 141 N. Y. 86.

When a case is not entitled to a preference in the Court of Appeals under subdivision 4 of section 791 of the Code.

Colton v. New York El. R. R. Co., 151 N. Y. 266.

Question not raised below is unavailable on appeal.

Blair v. Flack, 141 N. Y. 53.

A certificate of the General Term that a reversal was upon "the ground stated in the opinion" is not a proper method of stating that it was on a question of fact.

Matter of Laudy, 148 N. Y. 403.

The amendment of 1896 to section 191 of the Code, prohibiting appeals to the Court of Appeals from a judgment of affirmance in an action for personal injuries, where the decision of the Appellate Division was unanimous, applies to a judgment entered subsequent to the passage of such amendment, although the decision was rendered prior thereto.

Niendorf v. Manhattan R. Co., 150 N. Y. 276.

In order to raise the point in the Court of Appeals that the General Term erroneously refused for want of power to review the facts, because a properly certified copy was not before it, the order should show a refusal. *Dibble v. Dimmick*, 143 N. Y. 549.

4. Remittitur.

A motion for an amendment of a remittitur which was in effect a motion for a re-argument, denied.

Genet v. Delaware & Hudson Canal Co., 137 N. Y. 626.

Where after a remittitur had been sent down from the Court of Appeals, a motion for a re-argument was granted upon which the former decision was re-affirmed and a second remittitur sent down ordering the same as the first and granting costs in the Court of Appeals, the costs allowed were those on the re-argument.

Sweet v. Mowry, 138 N. Y. 650.

Where the General Term reversed a conviction for larceny and discharged the defendant because of the insufficiency of the indictment, *held*, that the Court of Appeals on deciding that the indictment was sufficient should remand the cause without affirming the judgment of conviction.

People v. Laurence, 137 N. Y. 517.

Appeal—*Continued.*

Pendency of an appeal is not a bar to a motion in the trial court for a new trial, and upon such motion production of the return on appeal is unnecessary. *Henry v. Allen*, 147 N. Y. 346.

5. Granting or Refusing New Trial.

Erroneous charge of trial judge in absence of plaintiff is error, available for reversal of the judgment without an exception.

Wheeler v. Sweet, 137 N. Y. 435.

What question may be reviewed by the Court of Appeals either upon the appeal from the order refusing to grant a new trial under section 190, subdivision 2 of the Code, or upon the appeal from the judgment. *Id.*

When the Court of Appeals will not grant a new trial in a capital case for errors in ruling. *People v. Youngs*, 151 N. Y. 210.

Granting of new trial indicates that proof might be given which would raise a disputed question. *People v. Kane*, 142 N. Y. 366.

When judgment involving the validity of a will will not be reversed for error in the admission of evidence.

Petrie v. Petrie, 126 N. Y. 683.

When it is apparent that no harm resulted to defendant because of admission of incompetent evidence, no ground for reversal in a capital case exists.

People v. Burgess, 153 N. Y. 561.

The summoning of trial jurors by mail is not prejudicial to defendant when all jurors qualified to sit appear. *Id.*

Under the provision of Code Criminal Procedure (§ 542), incompetent evidence upon a collateral issue, which could not have had an important effect upon the result, affords no ground for reversal.

People v. Waymann, 128 N. Y. 535.

Under Code Criminal Procedure (§ 542), where error appears at trial, judgment of conviction must be reversed.

People v. Wood, 126 N. Y. 249.

When questions of fact, unless properly raised, are not reviewable at General Term; and where the General Term has reversed the judgment upon an appeal from the judgment only, its decision cannot be sustained in the Court of Appeals upon the ground that the verdict was against the weight of evidence.

Peil v. Reinhart, 127 N. Y. 381.

When Court of Appeals will not reverse a conviction in a criminal case upon an objection to the power of the court to permit a peremptory challenge to be interposed.

People v. Hughes, 137 N. Y. 29.

Objection that the record does not show the entry of a judgment is not available to the appellant as a ground for reversal in criminal cases. *Id.*

When Court of Appeals, upon the review of a judgment in a capital case, will not disturb a verdict reached upon conflicting evidence.

People v. Slaney, 137 N. Y. 570.

Appeal—Continued.

Refusal to find that easements taken had in themselves only a nominal value is not ground for reversal.

Cook v. New York El. R. R. Co., 144 N. Y. 115.

When judgment will be reversed to enable the plaintiff to recover damages which by mistake he failed to prove.

Thomson-Houston Electric Co. v. Durant Land Imp. Co., 144 N. Y. 34.

Error in refusing to find that a landing was established by adverse possession is ground for reversal.

Iselin v. Starin, 144 N. Y. 453.

Even though some material and legal error was committed on a trial for murder, a new trial will not be granted in the absence of exceptions thereto, unless the record shows that the ends of justice require it.

People v. Leonardi, 143 N. Y. 360.

Where the charge concerning the question as to what constituted an excuse might have injuriously affected the minds of the jurors on the question of intent necessary to constitute a crime was erroneous, a general verdict of conviction should be set aside.

Id.

A judgment will not be reversed because the trial court drew, from facts properly in the case for other purposes, an erroneous legal conclusion as to a question not necessarily in the case.

Knoch v. Von Bernuth, 145 N. Y. 643.

An exception to a single wrong sentence in a charge is not sufficient for reversal.

Randall v. Packard, 142 N. Y. 47.

The admission of evidence which is a mere mathematical calculation, which the court or judge could make for himself, is not ground for reversal.

Witmark v. New York El. R. R. Co., 149 N. Y. 393.

A judgment will not be reversed for a technical error in the admission of evidence which did not affect the result.

Matter of Bernsee, 141 N. Y. 389.

The admission of evidence as to the value of shade trees destroyed is not ground for reversal where the objection thereto was not put on the ground that it did not present the proper measure of damage, and there is competent evidence on that question.

Evans v. Keystone Gas Co., 148 N. Y. 112.

The rejection of a juror in a criminal case upon the ground of his possible infamiliarity with the language and of general incompetency is not sufficient ground for reversing a conviction.

People v. Spiegel, 143 N. Y. 107.

The fact that incompetent evidence has been admitted to which the attention of the trial judge was not called, of itself affords no ground for disturbing the judgment.

Id.

Error cannot be charged to a ruling upon a challenge to a juror where the defendant afterward peremptorily challenges such

Appeal—*Continued.*

juror, and when the panel is full there remain peremptory challenges unused. *People v. Larubia*, 140 N. Y. 87.
It seems that the ruling would be open to review if the defendant had refrained from exercising his right of peremptory challenge, although such right has not been exhausted. *Id.*

Appearance ; *See Practice.*

Application of Payments ; *See Payments, II.*

Appurtenances ; *See Deeds.*

Arbitration and Award.

If an award does not appear upon its face to be definite and final, and does not in itself contain the data or means of working out a definite and final determination of the whole controversy submitted, the powers conferred upon the arbitrators have not been fully executed. *Herbst v. Hagenaeers*, 137 N. Y. 290.

Upon delivery of an award, the arbitrators become *functus officio* and without any power to alter or modify it. *Id.*

Where a motion to confirm is based upon both the original and supplemental awards it cannot be granted. *Id.*

It seems, that if an award fixes the rights of the parties subject to a mere matter of computation from books or documents equally accessible to both parties or in possession of the court, it might be held sufficient. *Id.*

On an arbitration of claims, prior to settlements between the parties, which neither asks to have opened, cannot be disturbed by proof of unsettled claims of third parties arising out of transactions included in such settlements, and a refusal to hear such proof is proper. *Elbert v. Haebler*, 149 N. Y. 343.

The mere computation of his claim by one of the parties after the evidence has been closed is not new evidence, and furnishes no ground for setting the award aside. *Id.*

Arrest ; *See Bail ; Criminal Law ; False Imprisonment ; Recognition.*

In order to authorize the enforcement of a judgment against the person, the complaint need not allege a conclusion of law.

Moffatt v. Fulton, 132 N. Y. 507.

In an action or a judgment recovered in another state for false representations, an order of arrest of the judgment debtor may properly be granted. *Leach v. Linde*, 142 N. Y. 628.

Arson ; *See Criminal Law.*

Assault and Battery ; *See Criminal Law.*

Assessments ; See *Municipal Corporations ; Taxation.*

Assignments ; See *Orders for Money.*

An order payable out of a certain fund specified in the order operates as an assignment *pro tanto* of such fund.

Stevens v. Ogden, 130 N. Y. 182.

An assignment of all the assignor's interest, under the will of a testator, by the terms of which she is entitled to a fraction of his estate, will pass a share in the estate of the testator's father which was vested in him at the time of his death.

Sanders v. Scutter, 136 N. Y. 97.

Where an assignment is accompanied by the execution of a defeasance limiting its effect to the securing of a specified sum, a subsequent assignment by the assignee of his right, title and interest will only vest an interest to the extent of the sum so secured.

Id.

Payment of money to stop litigation by an insolvent does not conclusively establish the validity of claim.

Beran v. Tradesmen's Nat. Bk., 137 N. Y. 450.

The implied engagement on the part of a banker to pay the checks of his depositor does not inure to the benefit of the holder of a check so as to enable him to enforce payment thereon against the bank prior to its acceptance.

First Nat. Bk. v. Clark, 134 N. Y. 368.

Nor will the delivery of the check with the banker's deposit slip have the effect of an assignment.

Id.

An executor's commission before they are ascertained and liquidated are unassignable.

Matter of Worthington, 141 N. Y. 9.

An assignment of a contract with the United States is valid as between the parties and vests the assignees as against the contractor and his creditors who had notice of the assignment with the right of subsequent payments for goods produced by them.

Matter of Home, 153 N. Y. 522.

An order by a contractor directing the owner to pay a sum specified to a materialman and deduct same from amount of contract, operates as an equitable assignment.

Crouch v. Muller, 141 N. Y. 495.

But an action cannot be maintained thereon against the owner who has paid over the money in the absence of notice of assignment.

Id.

Presenting the paper to owner who did not understand the language in which it was written, and incorrectly stating its contents to him, is not sufficient notice.

Id.

When an assignment of a patent includes future inventions in the line of manufacturing the same article.

Allison Brothers Co. v. Allison, 144 N. Y. 21.

An assignment of a patent and "any improvements on the same

Assignments—Continued.

which may hereafter be made" does not cover a subsequent independent invention. *Id.*

As between different assignees of a chose in action by express assignment from the same person, the one prior in point of time will be protected, though he has given no notice to the subsequent assignee or the debtor.

Fortunato v. Patton, 147 N. Y. 277.

A junior assignee of moneys to become due under a municipal contract cannot avail himself of a provision of the contract forbidding the assignment, without the consent of the city, of the contract, or of moneys to become due under it, and providing that in the absence of such consent no claim shall be asserted against the city, to attack the priority of a senior assignee to such moneys, where they have been paid into court by the city.

Id.

An assignee of moneys to become due under a contract, does not waive his rights by accepting a second assignment as additional security and leasing a portion of the moneys. *Id.*

Chapter 248, Laws 1879, making all policies of insurance on the lives of husbands for the benefit of their wives assignable by the wife with the consent of the husband, applies to policies issued by foreign insurance companies and held within this state.

Spencer v. Myers, 150 N. Y. 269.

Where such assignment was made in the usual course of business to secure an honest debt, the assignee may, after the government has paid a claimant, enforce his rights thereunder against him or those who take with notice.

York v. Conde, 147 N. Y. 486.

Where a policy of insurance is assigned by a qualified assignment, "as interest may appear" under an agreement that the assignee shall support the insured and receive the sums so advanced out of the proceeds of the policy, a neglect by the assignee to continue such support and an absolute assignment of the policy by him to another will authorize the maintenance of an action by the insured to redeem and for a re-assignment of the policy.

Bohleber v. Waelden, 150 N. Y. 405.

An assignment of a contract for the sale of hemlock bark on certain land transfers title only to the bark.

Schoonmaker v. Hoyt, 148 N. Y. 425.

Assignment for Benefit of Creditors; See Bankruptcy; Fraudulent Conveyances; Insolvency.

I. NATURE AND CONSTRUCTION.

II. VALIDITY.

III. POWERS AND LIABILITIES OF ASSIGNEE.

IV. RIGHTS OF CREDITORS.

Assignment for Benefit of Creditors—Continued.**I. NATURE AND CONSTRUCTION.**

A creditor who has persuaded assignor to complete a contract is not estopped from maintaining an action to set the assignment aside. *Groves v. Rice*, 148 N. Y. 227.

A creditor cannot procure the completion of a contract in order to pay assignee therefor, in order to secure a preference. *Id.*

The preference of wages under the amendment of 1886 is in no way changed because assignor had given his note to the employe. *Matter of Scott*, 148 N. Y. 588.

An assignment for creditors providing for payment of the assignor's debts then "due or to grow due" does not cover a contingent liability for a possible deficiency in rent of premises relet by lessors after assignee vacates.

Matter of Hevenor, 144 N. Y. 271.

Where no general assignment is executed by the debtor, a transfer of property to secure creditors, followed by similar transfers to other creditors, on the following day, of the remainder of the debtor's property, cannot be considered as a violation of the General Assignment Act. *Maas v. Falk*, 146 N. Y. 34.

The inventory must be read in connection with the assignment in respect to the matters which it is required to contain.

Roberts & Co. v. Victor, 130 N. Y. 585.

Neither the assignee nor a creditor under the assignment can question the validity of the items preferred. *Id.*

The preference of a creditor must be made in good faith to sustain the assignment. *Id.*

An assignor is presumed to have intended the consequences of his own act. *Id.*

If the assignment is fraudulent in part, the whole instrument is void. *Id.*

The provisions of statute that the trust for the benefit of creditors shall be deemed discharged at the end of twenty-five years, and the estate revert to the grantor unless otherwise conveyed, apply to personal as well as to real property.

Mills v. Husson, 140 N. Y. 99.

The amendment of 1886 to the General Assignment Act includes wages due at the time of the assignment to former employes.

Matter of Scott, 148 N. Y. 588.

The amendment, however, is not retroactive. *Id.*

The main purpose of the statute is to identify the assignor.

Dutchess Co. Mut. Ins. Co. v. Wagoner, 132 N. Y. 398.

When an action by all the creditors alike to set aside transfers made by the debtor may be brought.

Spellman v. Freedman, 130 N. Y. 421.

Vacating an assignment for fraud renders its void *ab initio*.

Smith v. Wise, 132 N. Y. 172.

A creditor's action to set aside a general assignment cannot pro-

Assignment for Benefit of Creditors—Continued.

ceed after the death of assignor, unless his personal representative is made a party.

First Nat. Bk. of Amsterdam v. Shuler, 153 N. Y. 163.

The restriction in section 30 includes a judgment by confession upon the eve of the assignment, and in completion thereof.

Berger v. Varrelmann, 127 N. Y. 281.

What the judgment in a creditor's suit may contain. *Id.*

II. VALIDITY.

What transfer of all the property of an insolvent debtor is not within the statute prohibiting preferences in excess of one-third.

Tompkins v. Hunter, 149 N. Y. 117.

Section 3347, United States Revised Statutes, was intended for the protection of the government and does not invalidate a *bona fide* assignment before allowance of a claim against the government as between the parties thereto.

York v. Conde, 147 N. Y. 486.

A direction in an assignment for the payment of a debt at a greater amount than is due will not invalidate the assignment unless fraud is shown. *Roberts & Co. v. Buckley*, 145 N. Y. 215.

The fact that a debt is magnified in the inventory does not make it fictitious. *Id.*

The County Court has power to amend the schedules and inventory *nunc pro tunc*. *Id.*

When an assignment for creditors by a co-partner is not avoided by the preference of a debt due by the firm, although there has been a change in the *personnel* of the firm since it was contracted.

Peyser v. Meyers, 135 N. Y. 599.

The preference in a firm assignment of a note given to a former partner, to represent the amount of an indebtedness of the old firm to a third person which the new partnership assumed to pay, is not the preference of a fictitious debt and will not avoid the assignment.

Smith v. Smith, 136 N. Y. 313.

The intentional withholding of assets from the assignee renders the assignment void.

Coursey v. Morton, 132 N. Y. 556.

Subsequent payment of money previously withdrawn does not validate an assignment. *Id.*

Transfer to general assignee by debtor, of goods covered by chattel mortgage void for want of refileing, authorized assignee to recover goods from sheriff. *Bowdish v. Page*, 153 N. Y. 104.

An assignee cannot impair the interests of his *cestuis que trustent* by the prosecution of a remedy of which he has knowledge. *Id.*

Unless purchaser has previous notice of fraud a sale of real estate by an assignee is valid, as against general creditors.

Wilson v. Marion, 147 N. Y. 589.

Constructive notice of the fraud cannot be charged to such purchaser. *Id.*

Assignment for Benefit of Creditors—Continued.

An assignment for creditors is not rendered invalid by reason of the fact that it transfers to the assignee property subject to the payment of a chattel mortgage which has not been filed.

Kitchen v. Lowery, 127 N. Y. 53.

A general assignment executed in this state for benefit of creditors by an insolvent foreign corporation, where such assignment is permitted by the law of its domicile, will be recognized as valid here so far as it affects property within this state.

Vanderpoel v. German, 140 N. Y. 563.

The statutory provisions prohibiting a corporation from making any transfer or assignment in contemplation of insolvency refers solely to domestic corporations. *Id.*

Such assignment is properly executed by the president and secretary or treasurer, under the authority of board of directors, in the absence of contrary statutory provisions. *Id.*

III. POWERS AND LIABILITIES OF ASSIGNEE.

In an action to set aside a fraudulent assignment, refusal to allow disbursements by the assignee was proper.

Smith v. Wise, 132 N. Y. 172.

Allowances for services prior to the assignment and for necessary labor upon stock after assignment may be made. *Id.*

A sum may be paid to a creditor who was preferred next after the workmen. *Id.*

The mere act of depositing funds in his individual name is not *per se* such an appropriation by an assignee as to charge him with legal rate of interest. *Matter of Barnes*, 140 N. Y. 468.

It is error to charge assignee upon accounting with a sum collected by his attorney as costs of an action to set aside the assignment, where the sum allowed was intended to be in addition to the costs collected. *Id.*

IV. RIGHTS OF CREDITORS.

Pending the accounting by the assignee one of the assignors died, but it not appearing that he had any individual estate, *held*, that the accounting should not be suspended to bring in his personal representatives.

Pope v. Briggs, appeal dismissed in 137 N. Y. 631.

Claims against the firm have preference over individual claims.

Booss v. Marion, 129 N. Y. 536.

Associations ; See *Benevolent Associations ; Joint Stock Companies ; Partnership ; Religious Associations.*

Revocation of charter does not destroy property rights against others.

Wells v. Monihan, 129 N. Y. 161.

Associations—Continued.

A voluntary unincorporated association cannot be divested of its title to property by the general assembly.

Wicks v. Monihan, 130 N. Y. 232.

Its officers may recover an indebtedness due it after annulment of charter. *Id.*

An action cannot be maintained against an unincorporated association unless the debt is one for which the members might be jointly or severally liable. *McCabe v. Goodfellow*, 133 N. Y. 89.

The authority to create individual liability will not be presumed. *Id.*

A member pledging a specific sum is not liable for any amount in excess of his contribution.

McCabe v. Goodfellow, 133 N. Y. 89.

When person by his own act severed his connection with the association, is estopped from demanding a settlement for his services by his declaration to that effect on leaving.

Burt v. Oneida Community, 137 N. Y. 346.

When a by-law of a news association, which prevents its members from receiving or publishing news received from another like association covering a like territory, is valid.

Matthews v. Associated Press of N. Y., 136 N. Y. 333.

Where the provisions of the Constitution give the executive committee of an association power to arrange ground rents and other privileges, they may prescribe regulations for the vending of merchandise. *Round Lake Assoc. v. Kellogg*, 141 N. Y. 348.

Rules providing that goods and merchandise shall not be sold on any of the lots leased by the association without a license being first obtained are reasonable, and will be enforced by the courts. *Id.*

The board of managers has power to discipline for an unjust contract made outside of the Exchange.

Matter of Haebler v. New York Produce Exchange, 149 N. Y. 414.

By-law 32 of the Produce Exchange is not unreasonable. *Id.*

An offer to arbitrate before a person not a member of the Produce Exchange is not a compliance with by-law 32. *Id.*

Vested rights of property cannot be affected by the suspension of a member of the Produce Exchange. *Id.*

For what offences the board of managers of the Produce Exchange may expel members.

People ex rel. John v. Produce Exchange, 149 N. Y. 401.

What complaint is sufficient to give the board of managers jurisdiction of the proceedings. *Id.*

The board of managers of the Produce Exchange may discipline members for any unjust and inequitable breach of contract.

Matter of Haebler v. New York Produce Exchange, 149 N. Y. 414.

Assumpsit; *See Contracts*; *Goods Sold*; *Money Had*; *Money Paid*; *Work, Labor, etc.*

Attachment; *See Contempt.*

I. WHEN ALLOWED.

II. PRACTICE, AFFIDAVIT AND UNDERTAKING.

III. THE WARRANT AND ITS EFFECT.

IV. MOTION TO VACATE.

I. WHEN ALLOWED.

Money in the hands of an assignee for creditors, proceeds of sale of the assigned property, cannot be attached.

McAllaster v. Bailey, 127 N. Y. 583.

The amendment of 1894 to section 636 of the Code is confined to the creditor defrauded.

Penoyer v. Kelsey, 150 N. Y. 77.

An attachment may be granted in an action of conversion brought by an administrator with the will annexed against the executor who was removed.

Van Camp v. Searle, 147 N. Y. 150.

The general rule that an assignment for creditors executed in another state would vest title in the assignee to funds in this state, superior to an attachment subsequently issued here, is subject to exception where the law of the other state is in the nature of a local bankrupt law.

Barth v. Backus, 140 N. Y. 230.

In such case the attachment issued in this state creates a lien superior to the title of the assignee, even though the attaching creditor be domiciled in the same state as the insolvent.

Id.

To authorize an attachment under subdivision 2 of section 636 of the Code there must be actual or intended fraud upon creditors.

Casola v. Vasquez, 147 N. Y. 258.

The transfer of property in payment of an honest debt by a foreign limited partnership, while insolvent, in violation of the statute of the state of its organization making such payment a fraud on creditors, will not authorize an attachment.

Id.

The *res* must be within the jurisdiction of the court issuing the process.

Douglass v. Phoenix Ins. Co., 138 N. Y. 209.

The interest of a grantor after mortgage has been executed is liable to attachment.

Macaulay v. Smith, 132 N. Y. 524.

The interest of a vendee in possession of real estate is subject to attachment.

Higgins v. O'Connell, 130 N. Y. 482.

II. PRACTICE, AFFIDAVIT AND UNDERTAKING.

An affidavit for an attachment, which is made by plaintiff's attorney upon information and belief, and stating that the means by which affiant derived his information were a conversation with plaintiff through a long-distance telephone, is insufficient to support the attachment where it does not state that

Attachment—Continued.

affiant recognized plaintiff's voice, or show that he knew it was the plaintiff who was speaking to him.

Murphy v. Jack, 142 N. Y. 215.

An affidavit made by an agent or attorney of the attaching creditor averring the facts required, stating the source of his information and grounds of his belief, is sufficient to confer jurisdiction to grant the attachment.

Id.

"Right to reduce" within section 1690, subdivision 3 of Code construed and applied.

Wise v. Grant, 140 N. Y. 593.

Taking possession of stock in satisfaction of debt will defeat a subsequent attachment.

Flannery v. Van Tassell, 131 N. Y. 639.

An attachment cannot be served upon the attorney who procured a judgment; must be served on the owner thereof.

Flandrow v. Hammond, 148 N. Y. 129.

Section 655, subdivision 2 of the Code requires service of the summons without the state or by publication, and that the defendant has made default.

Whitney v. Davis, 148 N. Y. 256.

Upon attachment of property not capable of manual delivery, the person served must look to the notice alone to ascertain what property is attached and must base his action upon that.

Hayden v. Nat. Bank of N. Y., 130 N. Y. 146.

The knowledge as to the property to be attached must be derived from the notice.

Id.

Unless there is a substantial compliance with the statute, title to the property is not divested and the holder remains liable.

Id.

Service of a warrant against one member upon an officer of the bank does not reach funds belonging to the firm.

Id.

Creditors filing an indemnity have preference over others in the avails of attached property.

Cudahy v. Rhinehart, 133 N. Y. 248.

III. THE WARRANT AND ITS EFFECT.

A person who has obtained a lien by virtue of an attachment in other states, in violation of a decree appointing a receiver, cannot assert his lien in a court of equity.

Farmers' Loan & Trust Co., v. Bankers & Merchants' Tel. Co., 148 N. Y. 315.

The withdrawal of an execution prior to the sale does not affect the lien of the attachment issued.

Van Camp v. Searle, 147 N. Y. 150.

Successive attachments on real property have priority of lien in the order of their issue and levy.

Id.

Where an insufficient levy is made under a first attachment, the levies made under the junior attachment will, after judgment, inure to the benefit of the first attaching creditor.

Gillig v. George C. Treadwell Co., 148 N. Y. 177.

Attachment—*Continued.*

Section 638 of the Code requires a regular formal service of the attachment.

Kieley v. Central Complete Combustion Mfg. Co., 147 N. Y. 620.

A summons cannot be served on a person in charge of the property attached. *Id.*

A warrant of attachment reciting the grounds therefor in the alternative is defective. *Cronen v. Crooks*, 153 N. Y. 352.

IV. MOTION TO VACATE.

Where the summons is served on one of several defendants within the time prescribed, and no service is made or publication commenced against the others, an attachment against their joint property cannot be vacated for that reason.

Yerkes v. McFadden, 141 N. Y. 136.

The attachment and the lien continue, and where judgment is obtained on the joint liability, the joint property seized may be sold. *Id.*

Attorney; *See Champerty and Maintenance*; *Witness.*

An agreement to set aside the attorney's share for prosecution of a claim operates as an equitable assignment of an interest in the subject of litigation. *Holmes v. Evans*, 129 N. Y. 140.

Voluntary withdrawal of the attorneys operates as a forfeiture of their rights. *Id.*

An attorney's lien does not prevent a party from settling a judgment, suit or controversy. *Poole v. Belcha*, 131 N. Y. 200.

Until the lien of the attorney is asserted in some way, the judgment remains the property of the client. *Id.*

It must be shown that the release will defraud the attorney, to warrant the court in setting it aside. *Id.*

When testimony of general counsel of a woman for several years is subjected to disbelief when in conflict with her testimony.

Palmer v. Gould, 144 N. Y. 671.

Communications made to a friend, or to an attorney in the presence of a friend, are not privileged under section 835 of the Code. *People v. Buchanan*, 145 N. Y. 1.

What is a proper use of forms of law in criminal case, considered.

People v. Jugigo, 128 N. Y. 589.

Application of law student for leave to file a regent's certificate of examination *nunc pro tunc*, denied.

Matter of Mason, 140 N. Y. 658.

It is the duty of the court to punish an attorney who has been shown guilty of unprofessional misconduct.

Matter of Ryan, 143 N. Y. 528.

Substitution of an attorney by order of the court below, after the return has been filed in the Court of Appeals, is irregular, and

Attorney—Continued.

such order should be made only by the highest court; where there was no question as to his authority to be substituted, the court will act upon a motion by him to dismiss the appeal.

Squire v. McDonald, 138 N. Y. 554.

A recovery in attorney's action for services reversed where it appeared from the evidence that the plaintiff neither rendered the service he was employed to do, nor made any special preparation for its performance.

Thorn v. Beard, 135 N. Y. 643.

The employment of an attorney in an action under an agreement that he shall receive his compensation out of the proceeds, gives him an equitable lien on, or ownership as equitable assignee in them.

Harwood v. LaGrange, 137 N. Y. 538.

But if the agreement does not fix any sum or rate, he is bound, in an action to recover compensation, to establish by evidence competent against his client the value of his services.

Id.

Although the court may, upon motion, vacate the satisfaction of a judgment by the client in fraud of the rights of his attorney, it cannot in such proceeding fix an amount in excess of the taxed costs as a counsel fee.

Bailey v. Murphey, 136 N. Y. 50.

A client remains the lawful owner of the cause of action, and the lien of the attorney should not be exercised to prevent settlement of cause if client is willing to pay the attorney.

Lee v. Vacuum Oil Co., 126 N. Y. 579.

When attorneys have no ground for attacking a settlement which resulted in deposit of sum for purposes of meeting their claim.

Id.

How moneys obtained on a settlement in disregard of the lien of plaintiff's attorneys may be followed and the lien of the attorneys satisfied therefrom.

Peri v. N. Y. C. & H. R. R. R. Co., 152 N. Y. 521.

The power of Appellate Division to disbar an attorney, considered.

Rochester Bar Ass'n v. Dorothy, 152 N. Y. 596.

Counsel have no right to appeal in a capital case solely for the purpose of delay.

People v. Scott, 153 N. Y. 40.

When the relation of attorney and client is dissolved by the assignment of the rights of the client to a corporation.

Foster v. Bookwalter, 152 N. Y. 166.

Protection of the lien of an attorney under section 66 of the Code, considered.

Peri v. N. Y. C. & H. R. R. R. Co., 152 N. Y. 521.

In the absence of an agreement an attorney deserves compensation according to the reasonable worth of his services, of which the jury are the sole judges.

Randall v. Packard, 142 N. Y. 47.

After costs have been collected by an attorney, his lien upon them has been reduced to possession, and in the absence of a special agreement the client cannot insist upon their payment to him.

Matter of Barnes, 140 N. Y. 468.

Attorney—Continued.

The lien of an attorney under an agreement to procure an increase in the award for lands taken for a public street for a share of the increase so obtained is subordinate to a mortgage upon the property. *Gates v. De La Mare*, 142 N. Y. 307.

Attorney-General.

Malversations by trustees cannot be subject of an action in the name of the people at the instance of the attorney-general.

People v. Simonson, 126 N. Y. 299.

Auctions and Auctioneers.

Since 1868 there has been no statute of this state which provides for the payment of duties or fees upon sales of merchandise at auction.

People v. Wilderming, 136 N. Y. 363.

Under the provision of the New York Consolidation Act, the mayor may license an auctioneer, and such power is discretionary and cannot be reviewed by courts.

People ex rel. Schwab v. Grant, 126 N. Y. 473.

Authentication of Records ; *See Deeds ; Evidence.*

Awards ; *See Arbitration and Award ; Canals ; Eminent Domain.*

B.

Baggage ; *See Carriers ; Railroads.*

Bail ; *See Arrest ; Recognizance ; Sheriff.*

When mortgage is one of indemnity only, it cannot be foreclosed until the mortgagee has paid the amount of the bail bond.

Maloney v. Nelson, 144 N. Y. 182.

Supplementary proceedings may be based upon an execution issued upon a judgment entered on forfeiture of a recognizance.

People v. Cowan, 146 N. Y. 348.

Bailments ; *See Carriers ; Factors ; Pledge ; Warehousemen.*

Where a certificate of stock was placed in the hands of defendant as bailee until work should be done by contractors, who never completed their contract, the fact that the bailee might be subjected to an action at the instance of the contractors was no defense to an action brought by the bailor for redelivery.

Equity Gas Light Co. v. McKeige, 139 N. Y. 237.

While a bailor charging negligence against the bailee rests under the burden of proof, proof of the nature of the accident may afford *prima facie* proof of negligence and shift the burden upon the bailee.

Wittringham v. Hayes, 144 N. Y. 1.

Bailments—Continued.

Proof which makes out a *prima facie* case calling for evidence to rebut the presumption of negligence. *Id.*

In an action involving the question of the negligence of a bailee, testimony of an expert as to whether the injuries to the subject of the bailment were the result of ordinary wear and tear is competent. *Id.*

The proprietor of a factory who receives milk to manufacture from it butter and cheese, is a bailee, and is bound to exercise ordinary care for the protection and preservation of the property, and is liable for the proper discharge of his duty.

Stewart v. Stone, 127 N. Y. 500.

Bankruptcy ; See Discharge.

Case in which *held*, that fraud in procuring the discharge of bankrupt was not established.

Crouse v. Whittlesey, affirmed without opinion, 138 N. Y. 615.

The limitations of two years prescribed by section 5057, United States Revised Statutes, in actions by or against an assignee in bankruptcy, applied only to disputes which existed at the time of the bankruptcy.

Bowen v. D., L. & W. R. R. Co., 153 N. Y. 476.

Banks and Banking ; See Corporations ; National Banks.

I. BANKING CORPORATIONS.

II. BANKING BUSINESS.

I. BANKING CORPORATIONS.

The directors of the bank cannot anticipate an action to dissolve a bank after the superintendent of banks has taken possession of the assets. *Matter of Murray Hill Bk.*, 153 N. Y. 199.

An action by the directors of a banking corporation for the voluntary dissolution abates upon the entry of judgment of the dissolution. *Id.*

An agreement by a member of the New York Clearing House Association to clear for an outside bank is subject to rule 25 of the association. *O'Brien v. Grant*, 146 N. Y. 163.

Payments made by the clearing bank in good faith on the day following the insolvency of the bank for which it clears, and the use by it of securities deposited in reimbursement of such payments, do not constitute an illegal preference within the meaning of section 48 of the Stock Corporation Law. *Id.*

Section 52 of the Banking Law is not unconstitutional as to stockholders who became such prior to its passage.

Hirschfield v. Bopp, 145 N. Y. 84.

The liability imposed upon stockholders in banks by section 52

Banks and Banking—Continued.

- of the Banking Law is limited by section 55 of the Stock Corporation Law. *Id.*
- The complaint in an action to enforce the liability of the stockholder of a bank under section 52 of the Banking Law must allege facts showing that such liability is within the limitations imposed by section 55 of the Stock Corporation Law. *Id.*
- The complaint in such an action need not allege that the defendant became a stockholder after the passage of the act. *Id.*
- It will not be inferred in a mere appointment of a temporary receiver in an action by the superintendent of the banking department that the bank is insolvent.
- Sicklean v. Herold*, 149 N. Y. 332.
- A counter-claim for deposits in an action against a director upon a note entitles the defendant to interest from date of service of the answer. *Id.*

II. BANKING BUSINESS.

When a bank will not be charged with conversion.

Castle v. Corn Exchange Bank, 148 N. Y. 122.

A bank holding check for collection acts as agent for another bank sending the check.

Castle v. Corn Exchange Bank, 148 N. Y. 122.

What circumstances allow a bank to obtain lien of funds of a third party deposited by a broker.

Hutchinson v. Prest., etc., Manhattan Co., 150 N. Y. 250.

A bank, which in good faith received a check from a depositor, who obtained the same by an unlawful pledge of the securities of another, and has applied the same, is not liable to refund the amount.

Hatch v. Fourth Nat. Bk. of N. Y., 147 N. Y. 184.

Where the officers of a bank, with knowledge of its insolvency, receive on deposit the check of the depositor on another bank, the transferee of such check cannot recover thereon against the maker without proof that he is a *bona fide* holder.

Grant v. Walsh, 145 N. Y. 502.

Where the defense to an action upon a check by a transferee thereof from a bank in which it was deposited by the maker is fraud on the part of such bank in receiving the deposit when insolvent, evidence of knowledge of such insolvency by officers and transferee of note is competent. *Id.*

Although a customer is a note broker, a bank may assume that notes offered him are offered in good faith and within his lawful rights.

American Exchange Nat. Bk. v. New York Belting & Packing Company, 148 N. Y. 698.

A director, also agent, who procures an indorsement on condition

Banks and Banking—Continued.

that another indorsement shall be obtained, makes the bank chargeable with notice of non-fulfillment of condition.

Twenty-Sixth Ward Bank v. Stearns, 148 N. Y. 515.

When a bank, having taken the ordinary steps in carrying out a convenient mode of collecting a demand, and there being no question of holding other parties than the drawee, is not liable to drawer for negligence in collection.

Crouse v. First Nat. Bk. of Penn Yann, 137 N. Y. 383.

Where a cashier, having authority to draw upon the bank's correspondents, draws checks to the order of persons without their knowledge, and indorses them to others for his own use, his indorsement estops his bank.

Phillips v. Mercantile Nat. Bank, 140 N. Y. 556.

The fictitiousness of the maker's direction to pay does not depend upon the identification of the payee's name with some existent person, but upon the intention underlying the maker's act.

Id.

When payee named in a certificate of deposit, which is a negotiable instrument, who has not possession of such certificate, and who confesses his inability to surrender it on receiving payment, cannot recover thereon against the bank which issued it.

Read v. Marine Bk. of Buffalo, 136 N. Y. 454.

The provisions of Code Civil Procedure (§ 1917), authorizing a recovery upon lost negotiable paper upon giving indemnity, will not sustain such action when the instrument is not lost.

Id.

Bar ; See Estoppel ; Adjudication ; Judgments.

A valid judgment, regularly obtained by the landlord in summary proceedings to dispossess a tenant for non-payment of rent, is a bar to an action brought by the tenant against the landlord to cancel the lease between them, on the grounds that it was intended as a mortgage and was usurious.

Cochran v. Reich, 151 N. Y. 122.

Where the holder of the prior mortgage is made a party to an action to foreclose a junior mortgage, the complaint in which sets forth the prior mortgage and asks that the amount due thereon be ascertained and first paid out of the proceeds of sale, but makes default, a judgment following the prayer of the complaint is binding upon him, and is a bar to an action to foreclose his mortgage.

Jacobie v. Mickle, 144 N. Y. 237.

A judgment recovered by a married woman, in an action to which her husband was not a party, reversed on appeal, is not a bar to a subsequent action by the husband.

Stamp v. Franklin, 144 N. Y. 607.

The question of former adjudication, estoppel, or bar is not to be determined by the judgment alone, but by the judgment-roll.

Converse v. Sickles, 146 N. Y. 200.

Barbers.

Chapter 823 of 1895, prohibiting barbering on Sunday, is not unconstitutional. *People v. Hawnor* 149 N. Y. 195.

Bastardy.

When an undertaking on adjournment can be required.

People ex rel. Rietzenhaler v. Higgins, 151 N. Y. 570.

An undertaking on adjournment does not bind a surety beyond the first adjournment, unless the examination has been commenced. *Id.*

Section 849 of the Code of Criminal Procedure, in relation to an adjournment, is not changed by the charter of the city of Rochester. *Rietzenhaler v. Higgins*, 151 N. Y. 570.

Benefit Association ; *See Insurance, Life.*

Benefit Societies.

Where the form of application contains a provision that any untrue or fraudulent statement made therein will forfeit the right to all privileges or benefits, a misstatement as to the age of the applicant is material.

Preuster v. Supreme Council of the Order of Chosen Friends, 135 N. Y. 417.

What will not amount to waiver of such forfeiture, as an accused member must be deemed to have made a payment under pending the investigation at his own risk. *Id.*

The waiver by the applicant in an application for membership in a fraternal society, of the provisions of law preventing disclosures by physicians, is not against public policy.

Foley v. Royal Arcanum, 151 N. Y. 196.

When payment of an assessment to the wife of the secretary of a subordinate council at his residence in his absence is sufficient.

Anderson v. Supreme Council of Order of Chosen Friends, 135 N. Y. 107.

The constitution and laws of the Order of Chosen Friends, considered and construed.

Anderson v. Supreme Council of the Order of Chosen Friends, 135 N. Y. 107.

Payee of certificate of a mutual benefit society, organized to furnish substantial aid to "the families or assigns" of the members in the event of death, determined.

Sulz v. Mutual Reserve Fund Life Ass'n, 145 N. Y. 563.

What parol agreement by the beneficiary of an insurance policy with the insured is valid and creates a trust.

Hirsh v. Auer, 146 N. Y. 13.

Benefit Societies—Continued.

The directors of a mutual benefit society have no power to authorize the use of its reserve fund for the payment of its notes.

McClure v. Levy, 147 N. Y. 215.

From what fund judgment may be satisfied if by-laws especially provide for payments in a particular way.

Redmond v. Industrial Benefit Ass'n, 150 N. Y. 167.

When mutual assessment companies issued two classes of certificates payable out of different funds, they must be paid from the classes so provided.

People ex rel. Atty.-General v. Life & Reserve Ass'n, 150 N. Y. 94.

Special provision of by-laws for transfer from reserve funds to death funds, construed. *Id.*

Payment of death claims and division of remainder upon dissolution, construed. *Id.*

A provision in the certificate of membership requiring satisfactory proof of death does not require information as to the cause of death.

Buffalo Loan, Trust, etc., Co. v. Knights Templar & Masonic Mut. Aid Asso., 126 N. Y. 450.

A usage not shown to have come to the knowledge of the member is insufficient basis for its requirement. *Id.*

A *mandamus* will not lie to compel a second assessment to pay deficiency of a death loss even though a judgment was obtained against the society.

People ex rel. Meyers v. Masonic Guild & Mut. Benefit Asso., 126 N. Y. 615.

Benevolent Associations ; See Charitable Bequests ; Literary Associations ; Religious Associations ; Trusts.

The words "some other occupation," as used in the by-laws of a benevolent society, construed.

Neill v. Order of United Friends, 149 N. Y. 430.

Bequests ; See Legacies ; Wills.

Betting and Gaming.

The evidence that defendant took money to bet on a horse-race, is not sufficient to sustain a conviction for recording and registering bets and wagers.

People v. Wynn, affirmed on opinion below in 128 N. Y. 59.

The statute against betting and gaming is to be construed to accomplish the result intended.

Luetchford v. Lord, 132 N. Y. 465.

A mortgage given to secure a gambling debt is void as to mortgagee. *Id.*

Bigamy; *See Criminal Law.*

Bill of Lading; *See Carriers.*

Bill of Particulars; *See Pleading.*

The affidavit on which the motion for a bill is made must be verified by the party personally, unless it is impossible to procure his verification. *Cohn v. Baldwin*, 141 N. Y. 563.

Verification by the attorney when the party is absent from the country where the attorney resides is not sufficient if no other reason is shown. *Id.*

Where plaintiff's affidavits allege that all dealings between the parties were exhibited in defendant's books, and it is not denied, motion for a bill of particulars will be refused. *Id.*

Bill of Sale; *See Chattel Mortgage.*

Bills and Notes; *See Banks and Banking; Promise; Usury.*

I. NATURE AND REQUISITES.

II. INDORSEMENT AND TRANSFER.

III. ACCOMMODATION PAPER.

IV. GUARANTY AND SURETY.

V. DEMAND AND NOTICE OF PROTEST.

VI. PRACTICE AND REMEDIES.

I. NATURE AND REQUISITES.

An agreement by the creditor, to whom a demand note is given for a past-due indebtedness, to hold it until such time as he wanted the money, furnishes no consideration for an indorsement of such note by a third party.

Strong v. Sheffield, 144 N. Y. 392.

Personal representatives of the maker are not liable upon an instrument in the form of a note payable after maker's death, executed without consideration and intended to operate as a gift.

Holmes v. Roper, 141 N. Y. 64.

Where the officers of a bank, with knowledge of its insolvency, receive on deposit the check of the depositor on another bank, the transferee of such check cannot recover thereon against the maker without proof that he is a *bona fide* holder.

Grant v. Walsh, 145 N. Y. 502.

Where the defense to an action upon a check by a transferee thereof from a bank in which it was deposited by the maker is fraud on the part of such bank in receiving the deposit when insolvent, evidence of knowledge of such insolvency by officers and transferee of note is competent. *Id.*

The mere fact that the seal of a corporation was impressed upon an instrument in form of a promissory note does not render it

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non-negotiable, where the instrument does not refer to its being sealed, and there is no evidence to that fact.

Weeks v. Esler, 143 N. Y. 374.

Where the form of a cashier's check does not import notice of the fact that the funds of the bank are being used to pay his private debts, the bank cannot recover back the money paid.

Goshen Nat. Bk. v. State, 141 N. Y. 379.

Upon the exchange of promissory notes, the particular transaction is fully consummated and does not remain executory.

Rice v. Grange, 131 N. Y. 141.

Each note is a valid consideration for the other. *Id.*

The fact that one of the notes is not paid at maturity does not sustain the defense of failure of consideration in an action on the other. *Id.*

A holder cannot recover where there is no consideration

Leslie v. Bassett, 129 N. Y. 523.

Where officers of a corporation signed a note bearing the name of the corporation printed on its margin, and affixing the description "Pres't" and "Treas." to their signatures respectively, *held*, that they were liable thereon individually to a *bona fide* holder for value, without notice of the circumstances.

Casco Nat. Bk. v. Clark, 139 N. Y. 307.

Payment made on a note by a subsequent indorser to the holder not made as agent of the maker does not inure to his benefit, and he remains liable for the whole amount of the note.

Madison Square Bk. v. Pierce, 137 N. Y. 444.

Otherwise, *it seems*, as to accommodation paper. *Id.*

It seems, that where the note in such case is paid in full by the maker to the holder, or is merged in a judgment in his favor, the only right of the indorser who has made a partial payment to the holder is through the judgment or against the proceeds.

Id.

A making of a note by a debtor of a corporation at the request of one of its officers, in order to raise money with which to pay the maker's debt to the corporation, furnishes no consideration for the promise by the officer individually to renew the note.

Arend v. Smith, 151 N. Y. 502.

Duty of holder of note to indorser to present it for payment, and if payment is refused to protest it.

Carroll v. Sweet, 128 N. Y. 19.

As between holder and drawer, delay in presentment does not discharge drawer unless loss resulted. *Id.*

What risk a person assumes who takes a negotiable instrument under circumstances imposing the duty of inquiry.

Hanover Nat. Bk. v. American Dock & Trust Co., 148 N. Y. 612.

Although customer is engaged in the business of note brokerage,

Bills and Notes—Continued.

a bank has a right to assume that such customer is acting in good faith.

American Exchange Nat. Bk. v. New York Belting & Packing Co., 148 N. Y. 698.

A note signed by an individual, with the addition of the word "President," is an individual note unless the bank has notice that it was used as the note of a corporation.

First Nat. Bank of Brooklyn v. Wallis, 150 N. Y. 455.

A remedy against such signors individually is not affected by the circumstances that a previous note of a corporation had been used. *Id.*

The attachment of a corporate seal of a note does not affect its negotiability. *Chase Nat. Bk. v. Fawcett*, 149 N. Y. 532.

An instrument in the form of a promissory note is valid although it contains neither words of negotiability nor the words "value received," or any equivalent.

Carnwright v. Gray, 127 N. Y. 92.

When a consideration is implied from the character of the instrument. *Id.*

A promissory note, which by its terms is payable within a specified time after death of maker, is valid. *Id.*

A promissory note payable after the death of its maker is valid.

Hegeman v. Moon, 131 N. Y. 462.

A written statement that a certain sum of money is due a payee therein named, followed by the signature of the maker, implies an indebtedness from the maker to the payee. *Id.*

The acknowledgment of indebtedness and that it is due implies a promise to pay on demand and makes it a promissory note. *Id.*

A direction to an executor to pay such an obligation after his death is in the nature of a promise. *Id.*

The addition of explanatory words does not alter its nature. *Id.*

Whatever may be implied from the language actually used in an instrument is, in judgment of law, contained in it. *Id.*

II. INDORSEMENT AND TRANSFER.

Indorsement of a promissory note by the maker as first indorser does not affect the nature of his liability.

Madison Square Bk. v. Pierce, 137 N. Y. 444.

Circumstances under which held that the right of a party who discounted an indorsed note is not affected by the fact that he was induced to take further collateral security which is disallowed by some ruling of public policy.

Bowery Bank v. Gerety, 153 N. Y. 411.

A bank is not chargeable with notice of fraud, where the maker of a note presents it for his own benefit, although it is made payable to another and indorsed by him.

Cheever v. Pittsburgh, S. & L. E. R. R. Co., 150 N. Y. 59

Bills and Notes—Continued.

When notes specify that bonds were deposited as security and no bonds were given, an indorser is not discharged because such bonds were not deposited. *Nassar v. Campbell*, 147 N. Y. 694.

One who receives a gift of negotiable securities takes them subject only to such equities as then exist between the original parties. *First Nat. Bank v. Wood*, 128 N. Y. 35.

A principal is not chargeable with notice of an agreement made by his agent contrary to his instructions, and is entitled to recover on checks received from the agent under an agreement between the agent and the banker that the checks were to be given only as a memorandum. *Henry v. Allen*, 151 N. Y. 1.

An indorser cannot avail himself of his agent's mistake.

Chase Nat. Bk. v. Faurot, 159 N. Y. 532.

III. ACCOMMODATION PAPER.

When an accommodation maker is not discharged by the receipt, by the holder of the note from the insolvent estate of the indorser, of a dividend paid in compromise of the debt in proceedings in another state where the holder and indorser both resided. *Third Nat. Bk. v. Hastings*, 134 N. Y. 501.

Indorser for accommodation may be released by failure to observe the conditions imposed by him.

U. S. Nat. Bank v. Ewing, 131 N. Y. 506.

A bank is chargeable with notice of non-fulfillment of the condition of indorser, who agrees to indorse, if another indorser is secured, when the director of the bank secured the note and is the agent of the banks.

Twenty-Sixth Ward Bank v. Stearns, 148 N. Y. 515.

IV. GUARANTY AND SURETY.

An accommodation maker of a note, or one who becomes surety upon a note, his rights discussed and determined. Title of others who take with free knowledge of conditions fixed by accommodation maker. *Benjamin v. Rogers*, 126 N. Y. 60.

The holder of a note cannot recover thereon as against the estate of a surety who indorsed for a special purpose. *Id.*

Sureties are liable for violation of duty of their principal.

Walden Nat. Bk. v. Birch, 130 N. Y. 221.

A breach of duty is not waived by a discharge of contract liability. *Id.*

Where a right to sue the principal is waived, the sureties cannot be sued. *Id.*

V. DEMAND AND NOTICE OF PROTEST.

Where a notary who knew the residence of an indorser was in a town without the village, and had previously mailed a notice of protest to him at his post-office address in that town, under

Bills and Notes—Continued.

the provisions of Laws 1857 (chap. 416, 3), which permits such notice by mail where the indorser lives in the same city or town or has a place of business therein, or has indicated such residence, or from the best information obtained from facts upon which, *held*, that due diligence to give notice of protest was not exercised, and that the indorser was not charged with notice, since the mere consulting of a directory, where other means of information are accessible, is not sufficient inquiry.

Bacon v. Hanna, 137 N. Y. 379.

A non-resident having an office in this state where he received mail may be served with notice of protest there.

People v. North River Bank, 133 N. Y. 691.

The referee may find that such notice was duly addressed and mailed. *Id.*

When demand has been made the day after the receipt of the draft and protest the next secular day thereafter, the drawer was bound.

Sylvester v. Crohan, 138 N. Y. 494.

Under chapter 289 of 1887, making Saturday half-holiday, the holder of commercial paper due or presentable on Saturday may rest upon a demand made before noon and notice of protest on that day, or he may make a demand on Monday if notice of non-payment is given on the same day. *Id.*

The duty which the drawee owed to the drawer with respect to presentation was not the same as that which the bank owed to its depositor. *Id.*

The secretary of a corporation may, after the appointment of a receiver, waive notice of protest.

Ludington v. Thompson, 153 N. Y. 498.

Actual notice of a defect is necessary to defeat the rights of a *bona fide* holder for value.

Cheever v. Pittsburgh, S. & L. E. R. R. Co., 150 N. Y. 59.

When a person holds notes as collateral security and without receiving any notes accepts others in their place, he is a *bona fide* holder of the substituted notes.

American Exchange Nat. Bk. v. New York Belting & Packing Co., 148 N. Y. 698.

Even though a plaintiff gives evidence of a consideration for the note, defendant is not relieved from the burden of showing want of consideration. *Durand v. Durand*, 153 N. Y. 67.

VI. PRACTICE AND REMEDIES.

Though the holding of an accepted draft taken as security is subject to defense of failure of consideration, the holder may have recourse to the original obligation.

Leslie v. Bassett, 129 N. Y. 523.

Where a draft for the payment of money is made in another state by parties residing there, but is payable in the state where the

Bills and Notes—Continued.

drawee resides, the legal questions are to be decided by the law of this state. *Sylvester v. Crohan*, 138 N. Y. 494.

The holder of a note suing the maker upon it, where the defense is fraud on the part of the payee, including the execution and delivery of it, is not bound in the first instance to show the circumstances under which he received the note.

Pelly v. Naylor, 139 N. Y. 598.

Although witness was a customer of the bank and the note in suit had been transferred by him, his credibility is not a question for the jury.

American Exchange Nat. Bk. v. New York Belting & Packing Co., 148 N. Y. 698.

Parol evidence is admissible that a note was delivered by maker to the bank with consideration upon an understanding that he would not be liable thereon.

Higgins v. Ridgway, 153 N. Y. 130.

A proper defense to a note was that it was without consideration, and delivered on condition that the maker should not be liable thereon. *Id.*

What is insufficient to authorize submission of question of usury to the jury. *Rosenstein v. Fox*, 150 N. Y. 354.

Blasting ; See Negligence.

No action lies for an injury resulting from a lawful act performed with due care and diligence.

Booth v. Rome, Watertown, etc., R. R. Co., 140 N. Y. 267.

If the work could have been accomplished without causing the injury, or could have caused less injury, the act as performed was negligent. *Id.*

Where injury occurs through the negligence of an independent contractor, the principal is not liable, and if the injury was inevitable no one is liable. *French v. Vex*, 143 N. Y. 90.

Board of Audit ; See Canals ; State ; Towns.**Board of Claims ; See Canals.**

Where the original award of the Board of Claims was increased by the Court of Appeals, the latter sum should stand and *mandamus* will lie to compel payment if payment is refused.

Sayre v. State, 128 N. Y. 622.

The decisions of the board should be in writing, signed by all or a majority of the commissioners, and separately stating the facts found and the conclusions of law. *Yaw v. State*, 127 N. Y. 190.

Where a contract for board and lodging provides that there shall be "no deduction in case of absence," the measure of damage is the contract price. *Wilkinson v. Davies*, 146 N. Y. 25.

Board of Health; *See Constitutional Law*; *Health*.

Bona Fide Purchaser; *See Bills and Notes*; *Purchaser for Value*; *Sales*; *Vendor and Purchaser*.

Bonds; *See Appeal*; *Office*.

The sureties for the performance of a municipal contract are not released from an obligation to save the municipality harmless from claims for damages for personal injuries arising from negligence by the omission of the municipality to exercise the right to retain the contract money until the settlement of such claims. *Mayor v. Brady*, 151 N. Y. 611.

It is no defense to an action on the official bond of a town supervisor, that public school moneys placed in his hands for disbursement under the statute were lost without fault or negligence on his part. *Tillinghast v. Merrill*, 151 N. Y. 135.

What changes in specifications of building contract do not affect the bond of one who executed it to secure the principal contractor for due performance by the sub-contractor.

Henricus v. Englert, 137 N. Y. 488.

Payments by the principal contractor to discharge liens filed against the building for work and materials furnished to the sub-contractor, in the absence of evidence to the contrary, give the former a right of action upon the bond as for breach of contract by the sub-contractor. *Id.*

Under a bond to pay such part of the indebtedness of a third person as the creditor shall after due diligence fail to collect within one year from date, *held*, that the question of due diligence was properly left to the jury.

Salt Springs v. Nat. Bk. Sloan, 135 N. Y. 371.

The fact that the debtors are insolvent and have made an assignment for creditors is no excuse for failure to prosecute. *Id.*

Rights of holders of income bonds secured by mortgage issued by a railroad company, each containing a covenant for payment of income semi-annually out of the earnings of the road, with a provision that no more interest should be paid than should be certified by the board of directors to have been earned above expenses, including necessary repairs, considered.

Thomas v. N. Y. and Greenwood Lake Ry. Co., 139 N. Y. 163.

Liability of surety of deputy sheriff; what is misfeasance of such deputy. *Flack v. Brassel*, 153 N. Y. 621.

Separate bonds should be given by guardians *ad litem* for each infant defendant. *Crouter v. Crouter*, 133 N. Y. 55.

An action is not maintainable on a bond given by a deputy sheriff to the sheriff, to pay to the latter a portion of fees to recover the specified proportion of fees.

Deyoe v. Woodworth, 144 N. Y. 448.

Bonds—Continued.

Bonds issued by a cemetery association on the purchase of land, which is at the time of such purchase improved for cemetery purposes, are not invalid because they devote 75 per cent. of the net receipts of sales to their payment.

Seymour v. Spring Forest Cemetery Ass'n, 144 N. Y. 333.

A recital referring to a written contract annexed thereto in a bond conditioned for the performance of "each and every condition therein contained" is sufficiently broad to cover a breach of covenants.

Mayor v. New York Refrigerating Construction Co., 146 N. Y. 210.

A sufficient consideration for the giving of a bond is the letting of a contract on the promise of such bond, although the bond was given subsequent to the commencement of the work.

Smith v. Molleson, 148 N. Y. 241.

A bond, given to secure the payment of alimony, construed.

Ensign v. Jarvis, 147 N. Y. 687.

When action upon a covenant in a mortgage bond will not lie.

Belden v. Burke, 147 N. Y. 542.

Subsequent purchasers however, without notice of the actual transportation, may seek relief.

Id.

Release of a surety on a contractor's bond on failure to give certificate, construed.

Smith v. Molleson, 148 N. Y. 241.

When surety will not be released by the recall by the owner of a notice to terminate contract.

Id.

Bottles ; See Corporations.

Where the manufacturer on the sale of beverages took from the customer security for the return of the bottles, to be retained if they were not returned, *held*, that in the absence of an agreement to return them the transaction amounted to a conditional sale of the bottles.

People v. Cannon, 139 N. Y. 32.

The Bottling Act is constitutional.

Id.

Boundaries ; See Deeds.

If the distance specified from a fixed point of beginning extends to low water mark, the rule that monuments control distances mentioned does not apply.

Oakes v. De Lancey, 133 N. Y. 227.

A boundary by the ocean beach extends, unless otherwise indicated, to high water mark.

McRoberts v. Bergman, 132 N. Y. 73.

In the interpretation of a treaty, which supplanted a former treaty, ancient monuments govern.

Seneca Nation of Indians v. Hugaboom, 132 N. Y. 492.

A re-survey does not alter the boundary lines.

Id.

A party is bound by the conditions imposed by a statute under which suit is brought.

Id.

Bounty.

The purpose of Law of 1865, chapter 29, was to reimburse localities for previous expenditure in producing their quota of men.

Taber v. Supervisors of Erie, 131 N. Y. 432.

The word "quota" refers to the number called for by the national authorities. *Id.*

A person who had furnished a substitute is entitled to bounty only when the substitute had been credited on the quota called for. *Id.*

One who voluntarily furnished a substitute is not entitled to reimbursement. *Id.*

Breach of Promise to Marry.

In determining whether the facts in an action for breach of promise to marry constituted a contract, the court may not infer facts not sworn to, but may infer the meaning and intention.

Yale v. Curtiss, 151 N. Y. 596.

What facts and circumstances are sufficient to justify a finding that there was a contract between the parties. *Id.*

Mere courtship or even intention to marry is not sufficient to constitute a contract. *Id.*

Bridges ; See Highways ; New York and Brooklyn Bridge.

Maspeth avenue in the county of Kings and Queens is a public highway of which the boards of supervisors have control.

People ex rel. Keene v. Board of Supervisors of Queens Co., 151 N. Y. 190.

When, under section 130 of the Highway Law, a county is bound to contribute to the expense of a free public bridge.

People ex rel. Root v. Board of Supervisors, 146 N. Y. 107.

What is a town bridge within the meaning of the statute. *Id.*

The statutory duty imposed upon supervisors to rebuild bridges across streams between two counties and to divide the cost between the counties may be compelled by *mandamus*.

People ex rel. Keene v. Supervisors of Queens, 142 N. Y. 271.

The office of the writ is to make the supervisors act, and the exercise of their discretion as to the manner of performance cannot be controlled by the court. *Id.*

The fact that the plans for such bridge must be approved by the Secretary of War does not justify failure to rebuild, and will not defeat application for *mandamus*. *Id.*

Where the statute clothes the General Term with discretionary power to permit the erection of an elevated approach to a bridge, upon failure to obtain property owner's consent, their order is not reviewable on appeal.

Matter of East River Bridge Co., 143 N. Y. 249.

Brokers ; See Agency ; Factors ; Stock and Stock Jobbing.

An agreement by joint purchasers of land to pay broker who negotiated the purchase a certain sum per acre, construed.

Johnson v. Sirrett, 153 N. Y. 51.

A stock broker is not compelled to realize upon collateral before suing for balance due.

De Cordova v. Barnum, 130 N. Y. 615.

One party is bound by a contract so long as its conditions are fulfilled by the other.

Rogers v. Wiley, 131 N. Y. 527.

An acceptance of a benefit may operate as a waiver of order to close an account.

Id.

Upon producing a buyer who is willing and able to purchase property and whom the seller accepts as purchaser, a broker is entitled to his commission.

Kelley v. Baker, 132 N. Y. 1.

The earning of the commission is not dependent on the buyer carrying out his contract.

Id.

If an exchange of property is to be made, it is no defence to the broker's suit for commission that the title to the property offered in exchange is defective.

Id.

Otherwise if the broker assumes to execute for his principal an executory contract of sale or exchange.

Id.

Where there is sufficient evidence to show a consideration in support of an agreement to pay for services it should be submitted to the jury.

Myers v. Dean, 132 N. Y. 65.

But where no services were rendered by the broker the promise was void for failure of consideration.

Id.

Where stock carried on a margin is sold without proper notice, a subsequent promise by the customer to pay the amount lost upon the sale operates as waiver of notice and ratification of sale.

Gillett v. Whiting, 141 N. Y. 71.

In such case the court is justified in refusing to charge that to make a customer liable for a ratification it must appear that he knew his legal rights.

Id.

Where the broker sells stock without notice he does not lose his claim against the customer for advances made.

Miner v. Beveridge, 141 N. Y. 399.

Before a real estate broker can recover compensation he is bound to prove that he found a purchaser who was ready and willing to buy and produced him to the purchaser.

Gerding v. Haskin, 141 N. Y. 514.

Where a real estate broker is merely employed to find a purchaser, the seller to arrange terms and conditions, he may accept similar employment from a purposed purchaser, and is entitled to commissions from both.

Kansas v. Gottfried Krueger Brewing Co., 142 N. Y. 40.

The mere statement that the purchaser is responsible, in answer to an inquiry made for the purpose of merely finding out whether it was worth while to consider the matter, does not

Brokers—Continued.

preclude the broker from accepting employment with the purchaser. *Id.*

The New Jersey statute regulating brokers' commissions applies only where he is authorized to sell or exchange the land himself. *Id.*

A judgment in favor of defendants who as brokers had operated in stocks for plaintiff's cashier who had used plaintiff's funds in his speculations, affirmed, on the evidence.

Central Nat. Bk. v. White, 139 N. Y. 631.

Where in a contract for the sale of real estate negotiated by a broker and executed by his employer, a provision was made for the payment of a specified sum as liquidated damages by the purchaser in case of his failure to perform, which sum he elected to pay, *held*, that the broker was entitled at least to commissions. *Gilder v. Davis*, 137 N. Y. 504.

Facts upon which, *held*, that under a contract for the payment of a specified commission "if sold through your agency," no commissions were earned. *Condict v. Cowdrey*, 139 N. Y. 273.

A broker, employed to lease real property, is not entitled to commissions until he negotiates a lease or procures the execution of a valid and binding agreement for a lease.

Crombie v. Waldo, 137 N. Y. 129.

Brooklyn; See *Municipal Corporations*; and *Brooklyn Bridge*.

When duty of a comptroller is ministerial only, performance may be controlled by *mandamus*. As to paid work on a contract where an action of certain officials is conclusive.

Matter of Freel, 148 N. Y. 165.

Chapter 710, Laws 1892, modified the revised charter of the city of Brooklyn as to confer on the fire commissioners the power of fixing the salaries of officers of the fire department.

People ex rel. Dobson v. Fire Comrs. of Brooklyn, 146 N. Y. 35.

Buffalo; See *Municipal Corporations*.

Section 504 of the charter of Buffalo, requiring contracts with the city to bind the contractors not to discriminate against members of labor organizations or to accept more than eight hours as a day's work, is simply directory.

People ex rel. Warren v. Beck, 144 N. Y. 225.

When an assessment for paving in a park may include improvements on streets outside park used to furnish proper drainage.

Kittinger v. City of Buffalo, 148 N. Y. 332.

Power of board of assessors to fix district assessment.

People ex rel. Lehigh Valley R. R. Co. v. City of Buffalo, 147 N. Y. 675.

Real property is assessed for improvement erroneously, the court may send the assessment roll back for correction. *Id.*

Building and Loan Associations.

What is valid defense to an action by withdrawing member to recover dues paid by him.

Englehardt v. Fifth Ward Permanent Dime Savings & Loan Ass'n, 148 N. Y. 281.

A member is bound by a reasonable amendment of the by-laws. *Id.*

It is reasonable to pass an amendment to the by-laws that withdrawing members shall be paid in order. *Id.*

Where statute provides that the certificate of incorporation may provide for three different classes of stock, and a certificate is refused upon that ground, its issuance may be compelled by *mandamus*. *People ex rel Fairchild v. Preston*, 140 N. Y. 549.

Burden of Proof ; See Evidence.

Burglary ; See Criminal Law.

When separate counts for burglary, larceny and receiving stolen goods may be joined in same indictment.

People v. Wilson, 151 N. Y. 403.

What is not sufficient to exclude inference that a person had possession of stolen property. *Id.*

What is sufficient information to give jurisdiction to the magistrate to issue a warrant. *Swart v. Rickard*, 143 N. Y. 264.

Business Corporations ; See Corporations.

The filing in the office of the Secretary of State of the certificate of full-paid stock of a corporation organized under the Business Corporation Act of 1875 was a sufficient compliance with the statute, though not filed in office of county clerk.

Jones v. Butler, 146 N. Y. 35.

C

Calendar.

The bare fact that the sheriff has levied upon certain certificates of stock belonging to the defendant and in the possession of another, will not entitle party to preference.

Nichols v. Scranton Steel Co., 135 N. Y. 634.

Under section 791, subdivision 5 of the Code, a party is not entitled to preference where other persons are joined with him individually, although they may be executors.

Haux v. Dry Dock Savings Institution, 150 N. Y. 581.

Though preference was sought on the ground that plaintiff was an executrix she shall be refused advancement, since she had not brought the action in that capacity.

People v. Cannon, 139 N. Y. 645.

Calendar—Continued.

The provision of section 791, subdivision 10 of Code, giving a preference to causes entitled thereto by the general rules of practice, does not apply to the calendar of the Court of Appeals.

Nichols v. Scranton Steel Co., 135 N. Y. 634.

Canals ; See Board of Claims ; Negligence ; State.

When time under which Revised Statutes (226, § 49), as to limitation of time during which claim may be brought, begin to run.

Yaw v. State, 127 N. Y. 190.

As to land temporarily taken, the statute does not begin to run until the state has ceased to use the lands. *Id.*

Jurisdiction of the board of claims does not include claims for damages for injury resulting to a person on a canal boat through the negligence of servants or agents of the state.

Locke v. State, 140 N. Y. 480.

Under Laws 1870 (c. 321), filing of claim with canal appraisers is essential to give them jurisdiction. Proof of addressing and mailing a statement of the claims to the canal appraisers is not enough.

Gates v. State of N. Y., 128 N. Y. 221.

The jurisdiction of the tribunal being limited and special, no presumption in support of it will be entertained. *Id.*

The state is liable for injuries sustained through a defect in a bridge over an abandoned portion of the canal which was still maintained by the state.

Woodman v. State, 127 N. Y. 397.

The provisions of the said act has reference only to damages incident to the discontinuance. *Id.*

It was the intention of the state to continue the control of the superintendent of public works over the bridges until they were disposed of. *Id.*

Chapter 524 of 1857 was a valid additional appropriation of the water of Owasco lake subject to the right of riparian owners to be compensated for damages.

Wright v. Shanahan, 149 N. Y. 495.

An implied promise arising from conduct is sufficient to protect property from injury by the state.

Putnam v. State of N. Y. 132 N. Y., 344.

Land or water appropriated by the state must be definitely ascertained and described.

Hayden v. State of N. Y., 132 N. Y. 533.

The state has power to cure a defect in a former appropriation of land and to award compensation for additional land taken. *Id.*

A person is not bound by a report in which his claim was not considered. *Id.*

Where the description is definite an appropriation is valid. *Id.*

Where it did not appear that the overflow of a river the channel

Canals—Continued.

of which the state had changed would not have occurred if the change had not been made, *held*, that the state was not liable for not maintaining a guard-bank.

Stone v. State of N. Y., 138 N. Y. 124.

Where the state had abandoned the canal more than seven years before the damage, under L. 1877, c. 404, which provided that no claim should accrue because of the abandonment, *held*, that the claim was not maintainable. *Id.*

Cancellation; See *Cloud on Title; Mistake; Reformation of Instruments.*

Failure of plaintiff to rescind contract procured by fraud considered, and *held* under the circumstances not sufficient to deprive him of his remedy in equity.

Hasberg v. McCarty, 127 N. Y. 655.

When a creditor of an intestate may maintain an action to cancel a forged mortgage.

Nat. Bk. of West Troy v. Levy, 127 N. Y. 549.

When such action is not in the nature of a creditor's bill, it is not necessary to show the docketing of plaintiff's judgment and the return unsatisfied of the execution upon it before commencing the action. *Id.*

Carriers; See *Freight; Negligence; Railroads; Ships and Vessels.***I. FREIGHT.****II. PASSENGERS.****I. FREIGHT.**

A custom of steamship companies to pay land freight charges upon receiving goods on board their vessels, will not sustain an action for the recovery of such freight upon goods destroyed upon the wharf.

N. Y. Lake Erie, etc., R. R. Co. v. Nat. Steamship Co., 137 N. Y. 23.

Each of several carriers through whose hands freight passes has lien upon the goods for his unpaid freight until delivered to the consignee. *Id.*

Until delivery of such goods has been accomplished, such contract imposes no duty, express or implied, on the part of a carrier by water to reimburse a preceding land carrier for its share of the cost of transportation. *Id.*

Upon a shipment under a contract by the carrier to transport at reduced rates, upon condition that in the event of loss or injury the carrier's liability shall be limited to a valuation specified, the shipper can in case of loss recover no more than the specified sum.

Zimmer v. N. Y. Central, etc., R. R. Co., 137 N. Y. 460.

Carriers,—Continued.

Shipper will be held chargeable with knowledge of and to have assented to terms of contract where he had opportunity. *Id.*

Where compliance with the terms of a stipulation is necessary to secure reduction of rates, failure to so comply forfeits the privilege. *Lough v. Outerbridge*, 143 N. Y. 271.

A shipment bill providing that the carrier will not be responsible for delay, will not relieve it from the consequences of delay caused by its negligence.

Jennings v. Grand Trunk Ry. Co., 127 N. Y. 438.

Provisions in a shipping bill requiring presentment of damages within 36 hours, *held*, under the circumstances to be unreasonable. *Id.*

A person authorized to deliver property of another may ordinarily be considered a carrier as having authority to accept terms of affreightment. *Id.*

Where the goods are delivered pursuant to a previous understanding the person making the delivery cannot accept conditions. *Id.*

When shipper is not chargeable with notice of terms. *Id.*

Railroad company, undertaking to deliver goods at a point beyond its own line, is responsible for the consequence of any default or want of reasonable diligence, unless relieved by some limitation. *Id.*

It seems, where it does not contract to transport goods further than the terminus of its own road, it is only bound to carry them to that point. *Id.*

Evidence *held* sufficient to justify a finding of contract to transport to destination beyond the carrier's own line. *Id.*

Facts upon which, *held*, that carrier could not be charged as an insurer as for a deviation, because the steamer discharged at Southampton and did not go to London.

Robertson v. Nat. Steamship Co., 139 N. Y. 416.

Provisions in a shipping receipt that no statutory will be carried unless a memorandum in writing stating its character and value is also delivered, and a proper extra price paid, do not relieve a carrier from negligent act of its servants.

Rathbone v. N. Y. Central, etc., R. R. Co., 140 N. Y. 48.

Unless he is informed before or when the goods are received of their unusual value, the carrier is exempted for his negligence. *Id.*

Where the marks on the package indicate its nature, its acceptance without the written memorandum will be deemed a waiver of the terms of the shipping receipt. *Id.*

II. PASSENGERS.

When a steamboat company is liable to a passenger for the loss by theft. *Adams v. New Jersey Steamboat Co.*, 151 N. Y. 163.

Carriers—Continued.

The business of a ferry company must be conducted with such care and skill as will make the entrance upon its boats safe for persons of ordinary prudence.

Race v. Union Perry Co., 138 N. Y. 644.

When the question of reasonableness of the rule should not be submitted to the jury.

Barker v. C. P., N. & E. R. R. Co., 151 N. Y. 237.

A common carrier need not call to the particular attention of each passenger a reasonable and just rule which it has promulgated. *Id.*

The owner of a ship is not liable for mistakes of a physician employed thereon according to law.

Allan v. State Steamship Co., 132 N. Y. 91.

Case ; See Appeal ; Practice.

It is not necessary that there should be a certificate that the case contains all the evidence in order to authorize a review of exceptions to the rulings or charge of the trial judge.

Rosenstein v. Fox, 150 N. Y. 354.

Requests and refusals to find, or exceptions duly taken thereto, are properly a part of the "case" on appeal.

Young v. Young, 133 N. Y. 626.

A party seeking to strike out his adversary's exceptions on the ground that they were not duly filed must show so affirmatively. *Id.*

An exception is not available where the subject-matter is omitted on appeal.

Patten v. United Life & Accident Ins. Assoc. 133 N. Y. 450.

Cattle ; See Animals ; Estrays.**Cause of Action ; See Action, Right of.****Cemeteries.**

It seems, an action lies against a cemetery association, upon its certificate of indebtedness, for sums applicable to the payment of such certificate.

Thacher v. Hope Cemetery Assn., 126 N. Y. 507.

A corporation unable to use its lands for corporate purposes may be dissolved.

People ex rel. Oak Hill Cemetery Association v. Pratt, 129 N. Y. 68.

The dissolution must be according to statute. *Id.*

Possession of a lot under color of title for more than twenty years will protect the holder. *Conger v. Treadway*, 132 N. Y. 259.

Cemeteries—Continued.

Where owners of land organize a corporation for its management as a cemetery, of which they are the sole stockholders, and convey the land to it in exchange for corporate bonds, the fact that the land was not worth the sum secured is immaterial, as the transaction is, in substance, simply a change in the manner of holding the land.

Seymour v. Spring Forest Cemetery Assn., 144 N. Y. 333.

An agreement for the purchase of land by a cemetery association made prior to the filing of the certificate of incorporation is ratified and validated by subsequent acceptance of the deeds.

Id.

Bonds issued by a cemetery association on the purchase of land which is at the time of such purchase improved for cemetery purposes are not invalid because they devote 75 per cent. of the net receipts of sales to their payment.

Id.

Certiorari ; See Taxation.

The limitation of four months for taking out and serving a writ of *certiorari*, contained in Code Civil Procedure (§ 2125), does not apply to proceeding to review an order of commissioners of highways laying out a highway.

People ex rel. Cook v. Hildreth, 126 N. Y. 360.

The statute has extended the operation of the writ beyond what it had of common law ; what the court may review.

Id.

Certiorari does not lie to review an assessment, before the board of revision has acted thereon.

People ex rel. Martin v. Gilon, appeal dismissed, 128 N. Y. 651.

Upon *certiorari* to review an assessment for a local improvement, the determination of the assessors as to the property benefited and the extent thereof, is not subject to review except for errors of law.

People ex rel. Davidson v. Gilon, 126 N. Y. 147.

Under section 2120, subdivision 2 of the Code, an award made by commissioners appointed to estimate loss by reason of change of grades of streets may be reviewed by *certiorari*.

Matter of Fitch, 147 N. Y. 334.

Unless there is an admission in the return of facts alleged in the petition, the court under section 2138 of the Code cannot consider the allegations of the petition.

Miller v. Wurster, 149 N. Y. 549.

The granting of a writ to a taxpayer under Laws 1880 (c. 269), is a matter of right.

Matter of Corwin, 135 N. Y. 245.

The provision of the act of 1880, allowing the application to be made within fifteen days after the completion and delivery of the roll and the giving of notice, cannot be abridged by any act of the assessors or common council.

Id.

Certiorari—*Continued.*

The petition on such application is in the nature of a pleading and only conclusions of fact need be stated. *Id.*

It is a cardinal principle, as applicable to proceedings by *certiorari* as to other legal proceedings, that a party cannot be heard in court who has no interest in the matter pending.

People ex rel. Blakslee v. Com'rs of Land Office, 135 N. Y. 447.

Proper parties to writ of *certiorari* to review the decisions of the comptroller canceling the title of the state to lands within the forest preserve, considered.

People ex rel. Forest Commission v. Campbell, 152 N. Y. 51.

When the return of a writ of *certiorari* states two dates, one definitely and one indefinitely, the former will control.

People ex rel. Jordon v. Martin, 152 N. Y. 311.

Decision by the comptroller for payment of taxes may be reviewed by *certiorari*.

People ex rel. Brush Electric Mfg. Co. v. Wemple, 129 N. Y. 543.

The writ is appropriate only to review the judicial action of inferior courts or officers or bodies exercising judicial functions.

People ex rel. Trustees of Jamaica v. Supervisors of Queens, 131 N. Y. 468.

It is not available to review the action of a public officer or body which is merely legislative or administrative. *Id.*

Mere legislative action is not reviewable by *certiorari*. *Id.*

Where the bringing of the writ is erroneous it should be quashed. *Id.*

It is not proper to review by *certiorari* an order of the County Court confirming the report of commissioners appointed to lay out a highway.

People ex rel. D. L. & W. R. R. Co. v. County Court of Onondaga County, 152 N. Y. 214.

Where the commissioners of taxes refuse to decide in accordance with uncontradicted evidence as to the actual value of the capital stock and surplus of a corporation liable to taxation, such refusal amounts to legal error reviewable by *certiorari*.

People ex rel. Edison Electric Illuminating Co. v. Barker, 139 N. Y. 55.

Otherwise, *it seems*, where they proceeded upon information or evidence tending to support their decision in deciding upon questions of value. *Id.*

A relator, who does not claim to be the owner of the adjoining upland, has, therefore, no status to review the action of the land commissioners in granting to a third person, a strip of land under water.

People ex rel. Blakslee v. Com'rs of Land Office, 135 N. Y. 447.

Certiorari—*Continued.*

The facts that the relator has filled in some of the lands under water gives him no title thereto. *Id.*

An order quashing a writ of *certiorari* because relator had no power to prosecute it is reviewable by the Court of Appeals.

People ex rel. Forest Commission v. Campbell, 152 N. Y. 51.

The action of the Board of Supervisors in establishing a town fire district is legislative and cannot be reviewed by *certiorari*.

People ex rel. O'Connor v. Board of Supervisors of Queens Co., 153 N. Y. 370.

An appeal may be taken to the Court of Appeals from an order dismissing a writ of *certiorari* for want of jurisdiction. *Id.*

In a petition for a *certiorari* to review an assessment for taxation under chapter 269, Laws 1880, on the ground of irregularity, only the conclusions of fact need be stated.

People ex rel. Commercial Mutual Ins. Co. v. Tax Commissioners, 144 N. Y. 483.

When a petition for *certiorari* to review an assessment sufficiently specifies the grounds of illegality. *Id.*

An order quashing a writ of *certiorari* issued under chapter 269, Laws 1880, to review an assessment of the personal property of a corporation for taxation, is appealable to the Court of Appeals. *Id.*

Where a statute permits a local board of health to act upon its own inspection and knowledge of an alleged nuisance, its determination upon the question is not reviewable by *certiorari*.

People ex rel. Copcutt v. Board of Health of Yonkers, 140 N. Y. 1.

It seems, that the proceedings of a board of health illegally constituted cannot be reviewed upon *certiorari*. *Id.*

Certiorari may issue to review proceedings for criminal contempt.

People ex rel. Taylor v. Forbes, 143 N. Y. 219.

The act of the police commissioners in selecting newspapers to publish list of nominations for public office is judicial, and may be reviewed in *certiorari*.

People ex rel. Press Pub. Co. v. Martin, 142 N. Y. 228.

A statement in the return which, shows literal compliance with the statute is conclusive upon the court. *Id.*

In such case if the return be false, the remedy of the relator is by an action for making a false return. *Id.*

An action will lie against a highway commissioner for making a false return to a writ of *certiorari*.

Beardslee v. Dolge, 143 N. Y. 160.

An order of the Governor, disbanding a militia company, is not reviewable by writ of *certiorari*, as it is not a judicial determination.

People ex rel. Leo v. Hill, 126 N. Y. 497.

Nor though it is claimed that the act under which order was made was unconstitutional can courts intervene. *Id.*

Certiorari—Continued.

Where there is evidence to support the determination of the assessors as to value of property of corporation, it will not be reviewed by the Court of Appeals.

People ex rel. Hecker-Jones-Jewell Milling Co. v. Barker, 147 N. Y. 31.

A petition for a writ of *certiorari* under chapter 269, Laws 1880, to review an assessment for taxation on the ground of illegality, must specify the alleged illegality.

People ex rel. Commercial Mutual Ins. Co. v. Tax Commissioners, reversed, 144 N. Y. 483.

A petition which alleges that an assessment is illegal, invalid, void and erroneous, and specifies as grounds of illegality and error that the commissioners overestimated the valuation of scrip representing capital and surplus and "illegally and erroneously included in their valuation of personal property" certain sums, raises only the questions of overvaluation. *Id.*

Challenge ; *See Jury.*

Champertry ; and Maintenance ; *See Attorney.*

What does not constitute adverse possession against the remainderman rendering his deed void under the Champerty Act.

Sand v. Church, 152 N. Y. 174.

Chancery ; *See Equity.*

Charitable Associations ; *See Benevolent Associations.*

Charitable Requests ; *See Trusts.*

Charitable Trusts ; *See Trusts.*

Charter Party ; *See Ships and Vessels.*

Although navigated by unlicensed pilot, a vessel is not to be considered unseaworthy. *Tebo v. Jordan*, 147 N. Y. 387.

Mere representations by the owner of a wharf which are not embraced in the charter party fail to show a contract obligation on his part. *McCaldin v. Parke*, 142 N. Y. 564.

When a charter party is relieved from the effect of a covenant to deliver the vessel in good order at the expiration of the term, where such vessel was destroyed by fire without fault on the part of the hirer. *Young v. Leary*, 135 N. Y. 569.

Where there is a waiver, on the part of the owner, of delivery of the vessel on the day specified and extension of time therefor, a destruction of the vessel in the mean time without fault on the part of the hirer will be a destruction before any breach of the contract. *Id.*

Charter Party—Continued.

It seems, that a party can, if he so please, bind himself to deliver, notwithstanding the thing may perish which he contracts to deliver. *Id.*

Chattels; See Conversion; Fixtures; Personal Property; Sales.

A contract with a lithographing company under which it makes impressions upon stones from designs furnished by a person, the title to the stones to remain in the company, will not sustain an action of conversion by such person against one acquiring title to the stones through chattel mortgage foreclosure.

Knight v. Sackett & Wilhelms Lithographing Co., 141 N. Y. 404.

Chattel Mortgage.

I. WHAT IS.

II. RIGHTS OF PARTIES.

III. FILING.

I. WHAT IS.

A mortgage cannot be given future effect as a lien upon property not in existence when the rights of creditors have intervened.

Rochester Distilling Co. v. Rasey, 142 N. Y. 570.

A chattel mortgage upon a crop which has not been planted is not effectual as against a subsequent execution creditor. *Id.*

It seems, that such mortgage might operate by way of present contract, that the creditor should have a lien upon the property when it comes into existence, which equity would enforce. *Id.*

When an instrument will be considered a chattel mortgage.

Susman v. Whynard, 149 N. Y. 127.

A bill of sale absolute in form accompanied by an agreement to re-deliver on the repayment of the debt, is a chattel mortgage.

Button v. Rathbone, Sard & Co., affirmed, 126 N. Y. 187.

A bill of sale of goods stored in a warehouse, the goods not being delivered to the vendees, is a mortgage and not a pledge.

People v. E. Remington & Sons, affirmed on opinion below, 126 N. Y. 654.

II. RIGHTS OF PARTIES.

A condition in a chattel mortgage given to secure a note that the principal shall become instantly due if the mortgagor "permits or suffers any attachment or other process against property to be issued against it," refers to the property described in the mortgage.

Robertson v. Ongley Electric Co., 146 N. Y. 20.

When default is made in the payment of the debt secured by a

Chattel Mortgage—*Continued.*

mortgage on personal property the legal title to the property becomes vested in the mortgagee.

Kimball v. Farmers and Mechanics' Nat. Bk., 138 N. Y. 500. *It seems*, however, that so long as the mortgagor of a vessel is not disturbed in his possession he is entitled to receive the freight.

Id.

Case of several mortgages on same vessel, *held*, that as between two mortgagors the former had the prior right to the freight, less the sum paid by latter to discharge the liens and the expenses of returning the vessel.

Id.

Mortgagee may sue for conversion upon sale of mortgaged property. *Moore v. Prentiss Tool & Supply Co.*, 133 N. Y. 144.

An oral agreement cannot alter the terms of a written instrument.

Id.

Creditors of a mortgagor of chattels under a mortgage not refiled pursuant to Laws 1833, chapter 149, as amended by Laws 1879, chapter 418, acquire no rights, before judgment and execution upon their claims.

Tremaine v. Mortimer, 128 N. Y. 1.

In such case mortgagor may deliver that property in any honest way.

Id.

Circumstances under which *held* that the purchaser at a sale under execution against debtor issued on judgment obtained after an assignment could not maintain an action for conversion against the mortgagee, who took possession of goods before assignment and before the judgment was obtained.

Id.

Whether a creditor could in such an action maintain an action, query.

Id.

A creditor can only enforce his lien after failure of mortgagee to record a chattel mortgage by levy or the appointment of a receiver, and loses his lien by not proceeding until after an assignment.

Kitchen v. Lowery, 127 N. Y. 53.

Commencement of a creditor's suit without the appointment therein of a receiver is insufficient to secure the lien of creditor as against such chattel mortgage.

Id.

III. FILING.

Transfer to general assignee by debtor of goods covered by chattel mortgage void for want of refileing authorized assignee to recover goods from sheriff.

Bowdish v. Page, 153 N. Y. 104.

Failure to file a chattel mortgage renders it void as to the then existing creditors of the mortgagor.

Stephens v. Perrine, 143 N. Y. 476.

Where it is filed by the mortgagee who takes possession of and sells the property before the creditors enter judgment and issue execution, the rights of the creditors are not affected.

Id.

Otherwise, *it seems*, in case of a transfer of the property in good faith to pay the mortgage debt.

Id.

Chattel Mortgage—*Continued.*

In such case a receiver appointed in supplementary proceedings may maintain an action for the proceeds. *Id.*

The provisions of Laws 1833 (c. 279, § 1), rendering void as to creditors a chattel mortgage which is not filed as directed in a succeeding section of the act, applies in favor of antecedent creditors of the mortgagor. *Karst v. Gane*, 136 N. Y. 316.

A simple contract creditor is as much within the protection of the statute as a creditor whose debt has been merged in a judgment. *Id.*

A delay of six weeks in filing a mortgage, without any circumstance rendering so long a delay necessary is not a compliance with the act, and subordinates the claim of the mortgagee to that of prior creditors. *Id.*

Checks ; *See Banks and Banking ; Bills and Notes.*

Children.

On an appeal under section 749 of the Code of Civil Procedure from the commitment of children pursuant to section 291 of the Penal Code, when the evidence upon which the appeal is allowed does not allege any errors with reference to a determination of the facts, the evidence is not required to be returned, and the failure of the magistrate to preserve it furnishes no ground for reversal. *People v. Giles*, 152 N. Y. 136.

It is the duty of the magistrate holding courts of special sessions to keep minutes in order that their decisions may be reviewed. *Id.*

Churches ; *See Religious Associations.*

Citizenship ; *See Aliens.*

City of New York ; *See Municipal Corporations.*

Civil Damage Act ; *See Excise ; Liquor Tax Law.*

The amendment requiring notice before an action can be maintained did not apply to defeat existing causes of action.

Quinlarn v. Welch, 141 N. Y. 158.

Where the evidence of an infant child is sufficient in an action for sale of liquor to her father producing intoxication which resulted in his death, the case should be submitted to the jury. *Id.*

Its interpretation should be according to its true intent and meaning. *Dudley v. Parker*, 132 N. Y. 386.

The furnishing of liquor must be the proximate cause of the injury resulting from intoxication. *Id.*

Civil Damage Act—Continued.

Where the injury was not caused by the party to whom it was sold, the sale cannot be said to be the proximate cause of such injury. *Id.*

The knowledge of agent is knowledge of principal.

Hall v. Germain, 131 N. Y. 536.

The knowledge may be established by direct or circumstantial evidence. *Id.*

The landlord is not bound to insert a covenant on part of the tenant not to sell liquor on the premises. *Id.*

Where the lease is at will or sufferance it is the landlord's duty to prohibit sale of liquor. *Id.*

Liability exists if the liquor sold contributed in the slightest degree to the injury. *Id.*

The principal is bound by the conduct of his agent. *Id.*

Civil Rights ; See Constitutional Law.

The civil rights acts of 1895 confers no absolute right of admission to a public race meeting on the person who has been ruled off the turf.

Grannan v. Westchester Racing Assn., 153 N. Y. 449.

Discrimination not based upon race, creed or color does not come within the condemnation of the statute. *Id.*

Civil Service ; See Veterans.

Section 8 of the Civil Service Law of 1883, as amended by chapter 410 of 1889, required the mayors of cities to classify employes.

Chittenden v. Wurster, 153 N. Y. 664.

The clerk of the police justice of the city of Syracuse is a member of the civil service of that city, and his position is not a confidential one. *People ex rel. Sears v. Toby*, 153 N. Y. 381.

How the civil service rules of the city may be proved. *Id.*

A person appointed to an office without having passed a civil service examination may be discharged without notice or hearing.

People ex rel. Hannan v. Board of Health, 153 N. Y. 513.

The word "incompetency" as used in the act means capacity. *Id.*

The statutory provisions giving preference to veterans did not impair the authority of the warden or agent of a state prison to discharge a keeper.

People ex rel. Griffin v. Lathrop, 142 N. Y. 113.

Discharge of a temporary clerk is not within the provisions relating to veteran soldiers.

People ex rel. O'Connor v. Adams, 133 N. Y. 203.

Private employment of a person by a public officer is not subject to provisions of statute. *Sargent v. Gorman*, 131 N. Y. 191.

Civil Service—*Continued.*

Private employment cannot be made public by statute. *Id.*

The presumption is that the law is complied with. *Id.*

The superintendent of public works has the power of appointment of subordinates subject to section 9 of article 5 of the constitution.

People ex rel. McClelland v. Roberts, 148 N. Y. 360.

Article 5, section 9 of the constitution does not need additional legislation to put it in force. *Id.*

Chapter 344 of the Laws of 1895, as to examination of soldiers or sailors, is in conflict with, section 9, article 5 of the constitution.

Matter of Keymer, 148 N. Y. 219.

The provisions of section 9 of article 5 of the constitution relative to civil service, construed.

Chittenden v. Wurster, 152 N. Y. 345.

The Civil Service Law of 1883 and 1895 held in harmony with the constitution. *Id.*

A classification made by the mayor of a city while voidable protects officers appointed under it, and as to them must be deemed valid. *Id.*

A mayor refusing to make a classification may be required so to do by *mandamus*. *Id.*

When the question as to whether a competitive examination is practicable is one of law. *Id.*

Competitive examinations are not practicable for positions of a confidential nature. *Id.*

What positions should be deemed confidential. *Id.*

Positions in confidential class cannot be strictly limited. *Id.*

Claim and Delivery of Personal Property ; *See Replevin.***Cloud on Title ;** *See Cancellation ; Reformation of Instruments ; Specific Performance ; Taxation ; Vendor and Purchaser.*

Where plaintiff sought to have a power of sale given to the executor by a will declared void as repugnant to a prior absolute devise, and creating a cloud upon the title, *held*, that if the power was invalid the fact appeared on the face of the will.

Mellen v. Mellen, 139 N. Y. 210.

The fact that a deed purports to have been executed for a nominal consideration, does not show it to be fraudulent on its face, so as to deprive a creditor who succeeded to the title of the grantor from attacking it as in fraud of creditors.

Smith v. Reid, 134 N. Y. 568.

A town may maintain an action to set aside a deed of town lands executed in its name by one of the trustees without authority.

Trustees, etc., of Easthampton v. Bowman, 136 N. Y. 521.

The objection that the complaint does not show facts which

Cloud on Title—Continued.

authorize the commencement of an equitable action cannot be taken for the first time on appeal. *Id.*

Where a tax deed is made by statute conclusive evidence that the sale was regular, an equitable action will lie to cancel such deed if the prior proceedings were void.

Landers v. Downs, 141 N. Y. 422.

Where the will gave testator's property to his wife, and she having again married gave to her husband a mortgage on the real estate, which was recorded after her death, the mortgage is a valid lien on the property. *Swarthout v. Ranier*, 143 N. Y. 499.

Equity will interfere to prevent a threatened cloud on title where there is a determination to create a cloud.

King v. Townshend, 141 N. Y. 358.

Although a tax lease is ineffective to establish a title until notice to redeem has been given, it may be cancelled as a cloud on title. *Id.*

The objection that the lease is invalid, because the sale included an illegal charge for interest not appearing on its face, will not defeat the action. *Id.*

Where he can show possession and the presumption of ownership which follows therefrom, a party is not bound to show or defend his paper title. *Id.*

Clubs ; See Excise.

Action against trustee of a club, incorporated for social purposes, is not penal. *Roger v. Decker*, 131 N. Y. 490.

The liability is analogous to that of partners. *Id.*

Where property is conveyed subject to the by-laws of club, they may be construed to authorize an assessment for permanent improvements.

Whiteside v. Noyac Cottage Assn., 142 N. Y. 858.

A broker, who is also one of the purchasing committee of a club, cannot reserve commission to himself.

Redhead v. Parkway Driving Club, 148 N. Y. 471.

What is not a sale by a club, within the meaning of the Excise Law of 1892.

People v. Adelphi Club, 149 N. Y. 5.

Code of Civil Procedure ; See Practice.

Collateral Inheritance Act ; See Transfer Tax.

Legacies to foreign legatees under the will of a non-resident testator, which are paid by his executors out of assets in the foreign country, are not taxable under the Collateral Inheritance Act as amended in 1887. *Matter of James*, 144 N. Y. 6.

Shares of stock in foreign corporations owned by a non-resident testator at the time of his death, are not taxable under said act, even when the certificates are within this state. *Id.*

Collateral Inheritance Act—*Continued.*

The exemption in the law of 1887, as to "the societies, corporations and institutions now exempt by law from taxation," did not apply to bequests to municipal corporations.

Matter of Hamilton, 148 N. Y. 310.

The provisions of the Collateral Inheritance Tax Act apply only to the property of which the decedent died seized and possessed,

Matter of Vassar, 127 N. Y. 1.

The Collateral Inheritance Tax Act's provisions relating to exemptions are to be construed strictly against the government. *Id.*

Where the amounts paid to the remaindermen are contingent, and the annuities not being vested interests, no tax can be imposed.

Matter of Roosevelt, 143 N. Y. 120.

An interest cannot be taxed until it is determined whether it is vested or contingent.

Matter of Curtis, 142 N. Y. 219.

Under the amendment of chapter 113 of 1887, personal property in this state owned by a non-resident intestate at the time of his death, which was habitually kept or invested by him here is liable to tax.

Matter of Romaine, 127 N. Y. 80.

An estate in remainder created by the will of the testator who died while the act of 1885 was in force must be appraised as of the time of testator's death.

Matter of Davis, 149 N. Y. 539.

The provisions of L. 1890, c. 553, exempting gifts to certain charitable, benevolent, etc., corporations from the legacy tax do not apply to a bequest to a foreign corporation.

Matter of Prime, 136 N. Y. 347.

A special act of the legislature authorizing a missionary association to be incorporated in another state to take and hold within certain limitations, real and personal property in this state, will not bring such corporation within the exemption of the act of 1890.

Id.

The amendment of the Collateral Inheritance Tax Act by L. 1891, c. 215, which amended the first section of the act of 1885 as already amended by the act of 1887, did not repeal the provisions of the amended act so as to prevent the subsequent institution of proceedings thereunder to tax the estate of a decedent previously dying.

Matter of Prime, 136 N. Y. 77.

Such real property cannot be made subject to taxation by the application of the doctrine of equitable conversion.

Id.

The Collateral Inheritance Tax Act of 1885, §§ 13, 15, conferred upon the surrogate the powers of an assessing and taxing officer; and the state was, therefore, bound by his determination in relation to the tax.

Matter of Wolfe, 137 N. Y. 205.

A fiscal officer to whom the tax was payable was not a person interested in the property to whom notice was required to be given.

Id.

The question of exemption from such tax could be determined by the surrogate in the proceedings for assessment.

Id.

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Collateral Inheritance Act—*Continued.*

The tax is upon every interest, immediate or future.

Matter of Stewart, 131 N. Y. 274.

Future contingent interests created by will may be taxed. *Id.*

The estate of a beneficiary under power of appointment may be taxed. *Id.*

Where the question is whether a certain subject of taxation is embraced within a statute, it should be construed in favor of the citizen. *Id.*

That construction should be given which will effectuate the legislative intent. *Id.*

An executor is not prevented by service of citation from paying balance due on collateral inheritance tax. *Id.*

Collateral Securities ; *See Debtor and Creditor* ; *Pledge.*

Commissioners of Highway ; *See Highways.*

Commissioners of Land Office ; *See Board of Claims.*

Commission Merchants ; *See Factor.*

Commissions ; *See Executors* ; *Practice* ; *Clubs* ; *Trustees.*

Commitment ; *See Criminal Law.*

The adjudication of a police justice upon proofs submitted to him cannot be questioned on *habeas corpus*.

People ex rel. Protestant Episcopal House of Mercy, 133 N. Y. 207.

Immaterial defect will not invalidate a commitment. *Id.*

Commitment under Laws 1886 (chap. 353), *held* sufficient.

People ex rel. Danziger v. Protestant Episcopal House of Mercy, 128 N. Y. 180.

What traverse of the return controverts the facts on which jurisdiction of magistrate rested. *Id.*

Common Schools.

In determining to erect a school-house, a majority of those actually voting is sufficient. *Smith v. Proctor*, 130 N. Y. 319.

Statute gives power to boards of supervisors to form school districts outside of cities.

People ex rel. Strough v. County Canvassers of Jefferson, 143 N. Y. 84.

The imposition of a fine upon a school teacher by the board of education is unwarranted as being a punishment and contrary to statute.

People ex rel. Hoffman v. Board of Education, 143 N. Y. 62.

Common Schools—Continued.

Action of school commissioners is not subject to review by comptroller when legally performed.

People ex rel. Cronin v. Coffey, 131 N. Y. 569.

Compensation ; See Eminent Domain.

The award of nominal damages only is proper where the lands taken are subject to easements of the same general nature as a highway.

Matter of Adams, 141 N. Y. 297.

Unless expressly so provided, the franchise of a water company does not give it the exclusive right to purvey water in the district where it is located.

Matter of City of Brooklyn, 143 N. Y. 596.

Complaint ; See Pleading.**Compromise ; See Accord and Satisfaction ; Debtor and Creditor.****Comptroller ; See Taxation.****Condemnation Proceedings.**

A street railroad must obtain the consent both of the legal authorities and the property owners before it can apply to the courts to condemn the right to use the tracks of another company.

Colonial City Traction Co. v. Kingston City R. R. Co., 153 N. Y. 540.

Consents given by property owners to the construction and operation of a street railroad do not include the use of the tracks by another company.

Id.

Section 382, subdivisions 2 and 3 of the Code do not apply to a proceeding by an owner to recover compensation, where the public authorities have taken no steps to ascertain the damages.

Matter of Clark v. Water Comr's of Amsterdam, 148 N. Y. 1.

The Court of Appeals cannot hear an appeal from the order confirming the report of commissioners in condemnation proceedings.

Matter of Brooklyn El. R. R. Co., 147 N. Y. 344.

A question of law is raised by an objection that commissioners considered a tract of land with three separate buildings as three parcels instead of one.

Id.

An appeal lies at the Court of Appeals from an order of General Term reversing order affirming an award of commissioners.

Matter of Clark v. Water Comr's of Amsterdam, 148 N. Y. 1.

Conditions ; See Contracts ; Deeds ; Insurance Sales.**Confession of Judgment ; See Judgments.**

Conflict of Laws; See Foreign Judgments; Foreign Laws.

Under what circumstances the courts of this state should deny authority to the decisions of the courts of another state.

Teel v. Yost, 128 N. Y. 387.

When parties cannot be heard to re-litigate questions in another state in suit on judgment here. *Id.*

The operation of a judgment within a state cannot be questioned by foreign states. *Williams v. Williams*, 130 N. Y. 193.

The laws of Maine govern, when an offer to purchase goods is made in that state, although the acceptance is mailed here.

Wilson v. Lewiston Mill Co., 150 N. Y. 314.

A disposition of personal property made in this state by a competent testator, in a valid testamentary instrument, to trustees in a foreign country, for the purposes of charity to be established in that country, is valid, if in pursuance of law of place where trust is to be executed. *Hope v. Brewer*, 136 N. Y. 126.

The law of the place where a contract of affreightment is made determines the rights of the parties.

China Mut. Ins. Co. v. Force, 142 N. Y. 90.

Where relief would be granted in attachment to a citizen of this state to avoid an assignment made under the insolvent laws of another state, it will also be granted to a non-resident proceeding against a defendant having the same domicile as the plaintiff by attachment in this state.

Barth v. Backus, 140 N. Y. 230.

The citizens of this state have the same liberty to proceed in another jurisdiction in hostility to assignments made here as non-residents have to attack here assignments valid in their state. *Id.*

Consignor and Consignee; See Carrier; Factor.**Conspiracy; See Criminal Law.**

Where a verdict against some of the defendants is accepted, no further action can be had against the others.

Lockwood v. Bartlett, 130 N. Y. 340.

What is sufficient evidence to establish conspiracy and enable the party furnishing goods to recover therefor.

Clark v. Exchange Printing Co., 148 N. Y. 721.

What evidence may be given to prove conspiracy.

People v. Peckens, 153 N. Y. 576.

When acts and declarations of each conspirator are binding on the others. *Id.*

Declarations of a confederate are admissible against the others. *Id.*

Upon the trial of an indictment of retail coal dealers of a city for conspiracy, in entering into a combination to raise the price

Conspiracy—Continued.

of coal and to destroy competition, the judge charged that the agreement if proved was illegal, and if the jury found intent on the part of defendants, and that the price was raised in consequence of the agreement, the crime of conspiracy was established. *Held*, no error.

People v. Sheldon, 139 N. Y. 251.

Held, also, that a refusal to charge that the raising of the price of coal was not in itself an overt act was not error. *Id.*

If the jury have a reasonable doubt of the ability of accused to commit the conspiracy charged after hearing all the evidence, they may acquit. *People v. McKune*, 143 N. Y. 455.

Constable; *See Towns.*

Constitutional Law; *See Legislature*; *Plumber*; *Veterans*; *Vinegar.*

I. CONSTRUCTION OF CONSTITUTION.

II. RIGHTS SECURED BY CONSTITUTION.

III. CONSTITUTIONAL REQUIREMENTS OF STATUTES.

IV. SOVEREIGN POWERS.

V. MUNICIPAL CORPORATIONS.

VI. CONTROL OF PRIVATE CORPORATIONS.

VII. PUBLIC OFFICES.

VIII. GENERAL POWERS OF LEGISLATURE.

IX. RELATIONS OF FEDERAL AND STATE GOVERNMENTS.

I. CONSTRUCTION OF CONSTITUTION.

The owner of private property claimed to be taken under a statute is the only person who can claim the statute is unconstitutional.

Waterloo Woolen Mfg. Co. v. Shanahan, 128 N. Y. 345.

An order of the Governor disbanding a military company does not come within the prohibition of article 11, section 5, of the State Constitution. *People ex rel. Leo v. Hill*, 126 N. Y. 497.

Section 12 of article 6 of the new Constitution, prohibiting the increase or diminishing of compensation of judges or justices, is not retroactive.

People ex rel. Follett v. Fitch, 145 N. Y. 261.

A railroad policeman, appointed under section 58 of the Railroad Law, is a public officer within the meaning of article 13, section 5, of the Constitution.

Dempsey v. N. Y. C. & H. R. R. Co., 146 N. Y. 290.

An annual pass over the railroad, which forms part of the policeman's compensation in pursuance of an agreement made prior to the adoption of the Constitution, is not a free pass. *Id.*

Constitutional Law—*Continued.*

A notary public is a public officer within the meaning of section 5 of article 13 of the revised Constitution.

People v. Rathbone, 145 N. Y. 434.

Such prohibition applies to the use of a pass which the officer received before such provision went into effect. *Id.*

The provision of section 18 of article 3 of the Constitution of 1894, requiring the application for appointment of commissioners to determine whether a street railroad should be constructed, construed.

Matter of Board of Rapid Transit Railroad Com'rs, 147 N. Y. 260.

In interpreting a provision of the Constitution, its history and the circumstances attending its adoption must be kept in view.

Sweet v. City of Syracuse, 129 N. Y. 316.

Public property not appropriated by statute for private use does not require two-thirds vote of the legislature. *Id.*

The word "appropriating" refers to a transfer of public property as a gift or gratuity. *Id.*

Article 6, section 9, of the Constitution, that "no unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to support a finding of fact, shall be reviewed by the Court of Appeals," applies to special proceedings as well as to actions.

People ex rel. Manhattan R. Co. v. Barker, 152 N. Y. 417.

The fact of a unanimous judgment or order of affirmance by the Appellate Division is a decision that there is evidence supporting the findings of fact as expressed or necessarily implied. *Id.*

The provision of the Constitution taking away the limit of recovery in actions for injuries resulting in death is not retroactive.

Isola v. Weber, 147 N. Y. 329.

Section 9, article 5, of the Constitution as to competitive examinations is self-executing. *Matter of Keymer*, 148 N. Y. 219.

Section 6, article 6, is self-executing, and no order is necessary to transfer proceedings from the Oyer and Terminer to the Supreme Court. *People v. Hoch*, 150 N. Y. 291.

The provisions of section 9 of article 5 of the Constitution relative to civil service, construed.

Chittenden v. Wurster, 152 N. Y. 345.

The Civil Service Laws of 1883 and 1895, held in harmony with the Constitution. *Id.*

Section 14 of article 8 of the Constitution, that payment by cities to private charitable institutions may be authorized by the legislature, construed.

People ex rel. Inebriates' Home v. Comptroller of Brooklyn, 152 N. Y. 399.

The provision of the section that no such payments shall be made

Constitutional Law—Continued.

for any inmate not received and retained pursuant to rules established by the state board of charities operates from the time such rules are adopted. *Id.*

Section 153 of the Public Health Law as amended in 1895, construed. *People v. Hawker*, 152 N. Y. 234.

The validity of a law is to be determined by its purpose, and its reasonable and practical effect and operation.

Forster v. Scott, 136 N. Y. 577.

Amendment to article 6, section 13, of the state Constitution, giving certain justices of the Supreme Court, whose terms are abridged by reason of their attaining the age of seventy years, their compensation during the balance of the terms for which they have been elected, construed.

Gilbert v. Supervisors of Kings, 136 N. Y. 180.

It seems, that the sum fixed by such board of supervisors is not permanent, and may be reduced at any time. *Id.*

The provision of article 8, section 11, of the state Constitution, limiting the indebtedness of cities of over 100,000 inhabitants, except the issue of bonds for water supply, and permitting bonds for that purpose, construed.

City of Rochester v. Quintard, 136 N. Y. 221.

The provisions of Laws 1892 (chap. 54, § 4), amending the charter of Yonkers, and allowing a supervisor for each ward, to be elected in each, *held*, constitutional.

People ex rel. Clancy v. Supervisors of Westchester, 139 N. Y. 524.

The prohibition by the Penal Code of the employment of female children in theatrical exhibitions apply to all public exhibitions or shows, and is not contrary to the Constitution.

People v. Ewer, 141 N. Y. 129.

II. RIGHTS SECURED BY CONSTITUTION.

A statute which assumes to nullify a final and unimpeachable judgment, destroys the fruits of the judgment, and is unconstitutional. *Gilman v. Tucker*, 128 N. Y. 190.

Any law which prevents the enforcement or materially abridges the remedy for enforcing a contract is unconstitutional as affecting the obligation of a contract.

People ex rel. Reynolds v. Common Council of Buffalo, 140 N. Y. 300.

The payment of an award after confirmation cannot be defeated by the repeal of a statute which directs the establishment and manner of paying the award. *Id.*

Chapter 602, Laws 1892, in relation to the examination and registration or employing of master plumbers, is constitutional.

People ex rel. Nechamcus v. Warden of City Prison, 144 N. Y. 529.

Constitutional Law—*Continued.*

The provisions of the General Village Act, as amended by chapter 694 of 1893 in relation to drawing of jurors to appraise damages for lands taken, is unconstitutional.

People ex rel. Eckerson v. Trustees of Haverstraw, 151 N. Y. 75.

The Albany Police Law, chapter 427 of 1896, is unconstitutional.

Rathbone v. Wirth, 150 N. Y. 459.

Chapter 148 of 1893, confirming the illegal proceedings in the board of supervisors of Essex county, is in contravention of section 18, article 3 of the Constitution.

Williams v. Boynton, 147 N. Y. 426.

Section 17 of article 3, is not violated by chapter 572 of 1895 amending section 351 of the Penal Code which makes pool selling a felony.

Weaver v. Van De Carr, 150 N. Y. 439.

The provisions of the Mechanics' Lien Law that actions thereunder shall be tried in the same manner as actions for foreclosure of mortgages, is constitutional.

Schillinger Fire Proof Cement & Asphalt Co. v. Arnott, 152 N. Y. 584.

Statute making assessment of water rates without notice of hearing is unconstitutional.

Matter of Trustees of Union College, 129 N. Y. 308.

A subsequent enactment confirming a prior invalid act is not effective. *Id.*

A tax apportioned without due notice is void. *Id.*

The condition of the real property assessed is immaterial. *Id.*

An act requiring proceedings to test the validity of an assessment, to be commenced within a year after delivery of the roll, is not retroactive. *Id.*

Chapter 428, Laws 1885, authorizing the audit by the Board of Claims of the claim of the county of Cayuga for reimbursements of expenses for the trials of certain convicts for crimes committed in state prison, is not unconstitutional.

Board of Supervisors of Cayuga Co. v. State, 153 N. Y. 279.

The claim of a county for reimbursement of the expenses of trials of convicts for crimes committed in state prison is not a private claim within the meaning of section 19, article 3 of the Constitution. *Id.*

The limitation imposed by section 14, article 3 of the Constitution upon the audit and payment of claims does not begin to run until a tribunal has been constituted to hear them. *Id.*

Section 20 of chapter 601, Laws 1895, authorizing the Court of Appeals to review an order convicting a party as a disorderly person, is not unconstitutional.

People ex rel. Commissioners of Charities v. Cullen, 153 N. Y. 629.

Constitutional Law—*Continued.*

Chapter 383, Laws 1896, authorizing the seizure of any vessel used in disturbing oysters is unconstitutional.

Colon v. Lisk, 153 N. Y. 188.

Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use or enjoyment, without legal process or compensation, it is unconstitutional.

Forster v. Scott, 136 N. Y. 577.

An act which authorized the city authorities to file a map of a proposed street, and provided that an owner of property to be taken could not recover any compensation for improvements subsequently made, is in violation of the Constitution. *Id.*

An act requiring the payment of fines to commissioners of fisheries which would otherwise have been payable to the county treasurer does not deprive the county of money without due process of law, as such money is not the private property of the county.

People ex rel. Huntington v. Crennan, 141 N. Y. 239.

A provision, in an act authorizing the condemnation of land for park purposes, that the city may sell lands so acquired whenever its board of park commissioners shall determine that they are unnecessary to be longer used for the purpose of the commission, does not make act unconstitutional.

Matter of City of Rochester, 137 N. Y. 243.

Even in criminal prosecutions the legislature may enact that when certain facts have been proved, they shall be *prima facie* evidence of the existence of the main fact in question.

People v. Cannon, 139 N. Y. 32.

III. CONSTITUTIONAL REQUIREMENTS OF STATUTES.

Application of the rule that a general provision inserted in an act containing local provisions is valid, whether the subject is expressed in the title or not. *Ferguson v. Ross*, 126 N. Y. 459.

What the title of a private or local bill may embrace, discussed.

Van Brunt v. Town of Flatbush, 128 N. Y. 50.

The title of an act of the legislature was construed as to what the act contained. *Id.*

A statute incorporating a society and authorizing it to take a gift under the will of a foreign testator already deceased, but which violated the statutes of this state, is valid where the gift was valid by the laws of the testator's domicile.

Dammert v. Osborn, 140 N. Y. 30.

New York Constitution, article 7, section 14, prohibits the allowance of any claim which as between citizens of the state would be barred by lapse of time. Statute in conflict with this provision discussed.

Gates v. State, 128 N. Y. 221.

So held of a claim for personal injuries received by a workman falling from a canal bridge. *Id.*

Constitutional Law—*Continued.*

A law relating to particular persons or things of a class is a local law. *Matter of East River Bridge Co.*, 143 N. Y. 249.

While a statute may be unconstitutional as embracing more than the one subject expressed in its title, and a part only could not be sustained, yet if it merely affects private rights and the party concerned acts under it without objection, he is taken to have waived the defect in the law.

Mayor, etc., of N. Y. v. Manhattan Ry. Co., 143 N. Y. 1. Legislature has power to insert necessary provisions in a public bill. *Sweet v. City of Syracuse*, 129 N. Y. 316.

It is necessary that the title should indicate the subject. *Id.*

A municipal corporation may issue bonds for a city purpose. *Id.*

Permission to take water from a lake appropriated for canal purposes is not a sale of the canal or any part of it. *Id.*

A statute permitting a city to use water of a lake not needed for the use of the canal is not unconstitutional. *Id.*

Section 13 of the Liquor Tax Law does not appropriate money for local or private purposes within the meaning of article 3, section 20 of the Constitution, and the assent of two-thirds of the legislature is not necessary.

People ex rel. Einsfeld v. Murray, 149 N. Y. 367. The Liquor Tax Law is not unconstitutional because it does not follow the classification of cities in article 12, section 2 of the Constitution. *Id.*

A Liquor Tax Law is not a special city act and did not need to be submitted to the mayors of the cities affected by it. *Id.*

Chapter 537 of 1893 is not in contravention to article 3, section 16 of the Constitution, in that it does not relate to more than one subject. *People ex rel. Purdy v. Fitch*, 147 N. Y. 355.

The amendments to the charter of the New York & Long Island Bridge Company contained in the Laws of 1885 and 1892 not germane to its title are unconstitutional and void.

New York & Long Island Bridge Company v. Smith, 148 N. Y. 150.

Chapters 570, 571, 572 and 573 of 1895 can be treated as separate and individual acts in determining their constitutionality.

Weaver v. Van De Carr, 150 N. Y. 439. The provisions of Laws 1892, chapter 342, to establish the "Municipal Court of the city of Syracuse," held, constitutional.

Curtain v. Barton, 139 N. Y. 505. Held, also, that it was not unconstitutional within section 16, article 3, prohibiting the passage of a local act embracing more than one subject. *Id.*

A statute which amends an existing criminal statute by removing the minimum limitation of punishment is not objectionable as an *ex post facto* law. *People v. Hayes*, 140 N. Y. 484.

An act authorizing the condemnation of property as a nuisance

Constitutional Law—Continued.

without a hearing, is constitutional where it does not provide that such hearing is final.

People ex rel. Copcutt v. Board of Health, etc., 140 N. Y. 1.

IV. SOVEREIGN POWERS.

The provision of section 4 of chapter 516, Laws 1889, prohibiting the manufacture, sale or keeping or offering for sale of any vinegar containing any artificial coloring matter, was within the power of the legislature to enact.

People v. Girard, 145 N. Y. 105.

Chapter 823 of 1895 prohibiting barbering on Sunday is not unconstitutional.

People v. Havnor, 149 N. Y. 195.

Section 663 of the Consolidation Act, as amended by chapter 84, Laws 1887, requiring tenement-houses to be furnished by the owners with water on each floor, is a valid exercise of the police power.

Health Department v. Rector, etc., of Trinity Church, 145 N. Y. 32.

Chapter 570 of 1895, section 17, in relation to making or recording a bet on a horse race, is constitutional.

People ex rel. Sturgis v. Fallon, 152 N. Y. 1.

Chapter 570 of 1895 is not in violation of article 1, section 9 of the Constitution. *People ex rel. Lawrence v. Fallon*, 152 N. Y. 12.

V. MUNICIPAL CORPORATIONS.

Chapter 934, Laws 1895, annexing a portion of the county of Westchester to the city and county of New York, is constitutional.

People ex rel. Henderson v. Supervisors of Westchester Co., 147 N. Y. 1.

The provision of article 8, section 11 of the Constitution, prohibiting a county containing a city of over 100,000 inhabitants, or any such city, from becoming indebted to an amount, including existing indebtedness, exceeding ten per cent. of the assessed valuation of its real estate, is to be taken distributively.

Adams v. East River Savings Inst., 136 N. Y. 52.

When a county containing a city of more than 100,000 inhabitants desires to create an additional debt, the ten per cent. limitation is not reached until the county debt equals ten per centum of the valuation of all the real estate in the county. *Id.*

An appropriation of a portion of excise moneys to support a home for inebriates is not in violation of the Constitution forbidding the giving of aid to persons or associations by cities.

White v. Inebriates' Home for Kings County, 141 N. Y. 123.

VI. PRIVATE CORPORATIONS.

The acquisition of the property of a water company already in

Constitutional Law—Continued.

operation by a city is not unconstitutional as the proposed public use is of a larger scope than the former. *Id.*

Matter of City of Brooklyn, 143 N. Y. 586.

Section 52 of the Banking Law is not unconstitutional as to stockholders who became such prior to its passage.

Hirshfeld v. Bopp, 145 N. Y. 84.

A street railway constructed and owned by a city after a failure of private enterprise to do so, is for "a city purpose," within the meaning of article 10 of the Constitution.

Sun Printing & Pub. Assn. v. Mayor, 152 N. Y. 257.

The scope of section 18, article 3 of the Constitution, prohibiting the passage of private or local bills granting to any corporation or association or individual the right to lay down railroad tracks, considered. *Id.*

The Rapid Transit Acts do not contravene the provisions of article 8, section 10, or article 3, section 18, of the Constitution, and are valid. *Id.*

VII. PUBLIC OFFICES.

One holding an office under a city government is ineligible for election to the legislature.

People ex rel. Sherwood v. Board of Canvassers, 129 N. Y. 360.

A certificate of election will not be issued to such person. *Id.*

Chapter 60 of 1895, abolishing the office of police justice in New York city, is constitutional. *Koch v. Mayor*, 152 N. Y. 72.

Section 179 of the Military Code as amended in 1896, as to the payment of wages of armorers by the county, is constitutional.

Matter of Bryant v. Palmer, 152 N. Y. 412.

Power of appointment of subordinates is still vested in the superintendent of public works, subject to section 9, article 5 of the Constitution, requiring appointment to be made by a competitive examination.

People ex rel. McClelland v. Roberts, 148 N. Y. 360.

Additional legislation is not required to put said section in force, as the general Civil Service Law applies and covers the case. *Id.*

VIII. GENERAL POWER OF LEGISLATURE.

A statute authorizing the supervisors of a county to build a local bridge is unconstitutional.

People ex rel. Keene v. Supervisors of Queens, 142 N. Y. 271.

Where a provision of the Code tends to restrict the jurisdiction conferred by the Constitution it is void.

Hlynn v. Central R. R. of N. J., 142 N. Y. 439.

The constitutionality of an act is not to be determined by the manner in which its provisions may be carried.

People ex rel. Nechamous v. Warden of City Prison, 144 N. Y. 529.

Constitutional Law—*Continued.*

While the legislature cannot abridge the general jurisdiction of the Supreme Court, it may designate the place where surplus moneys arising from the sale of lands in foreclosure may be deposited. *Matter of Stillwell*, 139 N. Y. 337.

The purpose of Laws 1888 (chap. 325), to facilitate the passage of canal boats, is public, and does not require the assent of two-thirds of the members of each house of the legislature. The legislature is the judge of the propriety and utility of making such a statute.

Waterloo Woolen Mfg. Co. v. Shanahan, 128 N. Y. 345. The provisions of N. Y. Const. 18, article 6, give power to the legislature to establish in a city an inferior local court of civil and criminal jurisdiction. *Curtain v. Barton*, 139 N. Y. 505.

Where property outside a city is to be condemned for the use of the city, the legislature has no power to delegate the determination of the question of compensation to a court whose jurisdiction does not extend beyond the city limits.

Matter of City of Buffalo, 139 N. Y. 422. The jurisdiction of the Superior Court of Buffalo, *held*, not to extend beyond the city. *Id.*

The amendment of the Constitution in 1869, articles, 6, 12, *held*, not to authorize the legislature to extend the territorial jurisdiction of the local courts mentioned therein. *Id.*

The legislature has the right to enlarge the time in which a claim in any particular case might be filed.

Parmenter v. State of N. Y., 135 N. Y. 154. When under the provision of articles 7, 14, of the Constitution against the allowance of claims against the state, an act authorizing the Board of Claims to hear and determine a claim against the state is valid. *Id.*

The legislature has power to enact a general law regulating the compensation of laborers employed by the state which disturbs no vested right. *Clark v. State*, 142 N. Y. 101.

The provisions of the Code permitting a physical examination of plaintiff in an action for personal injuries enacts a rule of procedure, and does not violate any express or implied constitutional restraint upon legislative power.

Lyon v. Manhattan Ry. Co., 142 N. Y. 298. A statute which confirms the common-law power inherent in criminal courts of suspending sentence in certain cases is a valid exercise of legislative power.

People ex rel. Forsyth v. Court of Sessions of Monroe, 141 N. Y. 288.

An act permitting women to vote for school commissioners is unconstitutional.

Matter of Gage, 141 N. Y. 112. A second apportionment will not be set aside upon the ground

Constitutional Law—*Continued.*

that aliens were not excluded, where the objection was not previously presented and it is not shown that any inequality resulted. *Matter of Whitney*, 142 N. Y. 531.

In apportioning a county into assembly districts, irregularity in the shape of a district does not of itself establish inconvenience in violation of the constitutional requirement.

Matter of Baird, 142 N. Y. 523.

It is not necessary that the board of supervisors should secure absolute equality of population in apportioning districts so long as no erroneous rule is adopted. *Id.*

Where the apportionment does not indicate such a manifest abuse of discretion as to amount to an evasion of the law, the courts cannot interfere. *Id.*

City wards may be divided in the formation of assembly districts, but not towns. *Id.*

IX. RELATIONS OF FEDERAL AND STATE GOVERNMENTS.

The act to authorize the drainage of marsh lands, chapter 844, Laws 1868, is contrary to the provision of the Federal Constitution giving Congress exclusive power to regulate commerce.

Coxe v. State, 144 N. Y. 396.

The provision in the Federal Constitution that "no state shall enter into any treaty, alliance or confederation" (art. 1, § 10), prevents a state from negotiating with the Indian tribes for the extinguishment of the Indian title to land.

Seneca Nation of Indians v. Christie, 126 N. Y. 122.

Such a dealing is not a treaty in the constitutional sense. *Id.*

The power conferred upon Congress by subdivision 15, section 8, article 1 of the Federal Constitution, as to arming of militia, does not exclude state legislation upon the same subject unless the power conferred on Congress is actually exercised.

People ex rel. Leo v. Hill, 126 N. Y. 497.

The order of the commander-in-chief of this state disbanding a company under authority of the state statute is not in contravention of the Constitution. *Id.*

Power to disband may be found in section 1630 of the United States Revised Statutes. *Id.*

Construction ; *See Contracts ; Deeds ; Instruments ; Statutes ; Wills.*

Contempt ; *See Constitutional Law.*

A judgment recovered by a receiver is not a proper subject for proceedings for contempt.

Taber v. Jack, appeal dismissed, 128 N. Y. 592.

Contempt—Continued.

Advice of counsel does not protect a party for violating an injunction.

Ciancimino's Towing and Transportation Company v. Ciancimino, 133 N. Y. 672.

A court cannot punish as a contempt the interposition of a false verified answer. *Fromme v. Gray*, 148 N. Y. 695.

In proceedings for criminal contempt the final mandate must state the particular circumstances of the offense.

People ex rel. Barnes v. Court of Sessions, 147 N. Y. 290.

Section 725, United States Revised Statutes, applies to the Supreme Court of the District of Columbia, and limits its power to punish for contempt to fine or imprisonment.

Hovey v. Elliott, 145 N. Y. 126.

A defendant, disobeying an injunction order, is properly punished for contempt, unless the order was void upon its face for an entire lack of jurisdiction.

People ex rel. Cauffman v. Van Buren, 136 N. Y. 252.

When for violation of an injunction order, restraining the disposition of property, which plaintiff seeks to subject to an attachment, defendants are properly fined the amount of plaintiff's judgment.

People ex rel. Cauffman v. Van Buren, 136 N. Y. 252.

To warrant punishment for contempt in disobeying judgment, the mandate must be clearly expressed so that it may appear with reasonable certainty that the person has violated it.

Ketchum v. Edwards, 153 N. Y. 534.

What judgment will not warrant punishment for contempt. *Id.* One who does an act with knowledge that the court has decided to restrain the doing thereof is guilty of contempt.

People ex rel. Platt v. Rice, 144 N. Y. 249.

An order loses none of its binding force pending an appeal therefrom. *Id.*

A notice served subsequent to the institution of proceedings for contempt, specifying the punishment which would be demanded, does not deprive the court of power to fix nature of offense.

People ex rel. Platt v. Rice, 144 N. Y. 249.

A party who neglects or disobeys an order after appealing therefrom cannot claim want of jurisdiction.

People ex rel. Platt v. Rice, 144 N. Y. 249.

Contracts ; See Bills and Notes ; Sales ; Statute of Frauds ; Vendor and Purchaser ; Warranty.

I. ASSENT AND AFFIRMANCE.

II. CONSIDERATION.

III. CONSTRUCTION.

IV. PERFORMANCE.

Contracts—Continued.

V. WHAT EXCUSES PERFORMANCE.

VI. REMEDY FOR NON-PERFORMANCE.

VII. RESCISION.

VIII. VALIDITY.

I. ASSENT AND AFFIRMANCE.

A subsequent agreement may be made between two parties after execution of original contract.

Rogers v. Wiley, 131 N. Y. 527.

Acceptance of an offer may be inferred from conduct. *Id.*

A combination of business formed as an illegal trust becomes executed when perfected. *Uncles v. Colgate*, 148 N. Y. 529.

One who has an interest in an illegal trust and endeavors to prevent a reorganization in legal form has no actual right to recover from the trustees the profits claimed to have been made. *Id.*

When a junior assignee of moneys under a municipal contract cannot avail himself of the provisions of the contract forbidding an assignment similar to his.

Fortunato v. Patten, 147 N. Y. 277.

When an agreement by manufacturers to furnish to a committee the material for a display of fireworks, sending a man to take charge, is a sale. *Wyllie v. Balmer*, 137 N. Y. 248.

The question whether a party assented to the terms of a proposed agreement which are telegraphed to him in a general way, and which he refuses to sign, is for the jury.

Stokes v. Mackay, 140 N. Y. 640.

Where all the elements of a complete contract are contained in letters and telegrams exchanged by the parties, the contract is binding upon both.

Sanders et al. v. Pottlitzer Bros. Fruit Co., 144 N. Y. 209.

A written agreement controls and is superior to a prior oral agreement. A reformation of the instrument can only rectify a mutual mistake of the written instrument.

Lintow v. Unexcelled Fireworks Co., 128 N. Y. 672.

So held in an action by the superintendent of a manufacturing corporation. *Id.*

Where evidence is contradictory a contract apparently full and drawn with great care will not be reformed on the ground of mutual mistake.

Allison Brothers Co. v. Allison, 144 N. Y. 21.

A party to a contract, while retaining the fruits thereof, cannot have it reformed. *Harbeck v. Pupin*, 145 N. Y. 70.

Where entire performance by one party is a condition precedent to the promise of the other, the contract is entire.

Ming v. Corbin, 142 N. Y. 334.

Contracts—Continued.

Where the performance by one party consists of several distinct items and the price paid by the other is to be so apportioned, the contract is severable. *Id.*

Where the parties intend the performance on either side in part and not to be taken as entire, it will be deemed to have been severed. *Id.*

II. CONSIDERATION.

Agreement *held*, not upon its face to express an agreement which was void as intended to improperly influence legislation.

Milbank v. Jones, 127 N. Y. 370.

An agreement to withhold suit is a good consideration to support a promise by a third person to pay a debt.

Traders' Nat. Bk. v. Parker, 130 N. Y. 415.

Where no definite time for payment is fixed upon, the agreement binds the creditor not to sue within a reasonable time. *Id.*

A making of a note by a debtor of a corporation at the request of one of its officers in order to raise money with which to pay the maker's debt to the corporation furnishes no consideration for the promise by the officer individually to renew the note.

Arend v. Smith, 151 N. Y. 502.

Held, also, that it was conclusive as to the legal and proper expenses of administration assumed by defendant. *Id.*

Held, also, that the cost and expenses incurred in the executor's unsuccessful defense to a demurrer interposed by defendant could not be included. *Id.*

When defendant agreed to pay all the debts allowed or legally established against the estate of a decedent, the decree entered upon the judicial settlement of the executor's accounts, to which defendant was a party, as to amount of debts was conclusive.

Lawrence v. Church, 128 N. Y. 324.

III. CONSTRUCTION.

A contract for the conditional sale of the plant of a factory providing that "said machinery shall be the property of purchaser until paid for," includes the working patterns.

Brewer v. Ford, affirmed without opposition, 126 N. Y. 643.

A contract for the payment of \$5,000, "which sum is hereby named as stipulated damages to be paid," construed as for the payment of liquidated damages, and payable upon the violation of the terms of the agreement.

Tode v. Gross, 127 N. Y. 480.

Under a general obligation to maintain and support another, the beneficiary may live any place.

McArthur v. Gordon, 126 N. Y. 597.

It seems that the rule is subject to exceptions. *Id.*

Contracts—Continued.

Peculiar terms of declaration of trust for support of incompetent person out of proceeds of a farm conveyed to the trustee.

Action against bank in Tennessee for proceeds of check duly collected by it in Texas, *held*, contract was to be performed in Texas and New York, and law of Tennessee did not obtain or govern. *St. Nich. Bk. v. State Nat. Bank*, 128 N. Y. 26.

A reasonable interpretation should be given to the terms of a contract. *Wright v. Renssens*, 133 N. Y. 298.

A party failing to perform terms of an agreement cannot terminate the contract. *Id.*

An agreement between two parties to dispose of the goods of another and divide the profits between all the parties, is a joint contract. *Drexel v. Pease*, 129 N. Y. 96.

One who holds as security an interest in a patent is not joint contractor. *Barry v. Colville*, 129 N. Y. 302.

A person who is to receive for his services a certain portion of the profits is not a joint contractor.

Jenkins v. Dean, 130 N. Y. 275.

The practical construction put upon a contract by the parties is often most conclusive as to its meaning.

Nicoll v. Sands, 131 N. Y. 19.

The acceptance of performance of a contract may be observed in its interpretation. *Id.*

A collateral agreement, fair on its face, will not invalidate a contract. *Id.*

When an offer to purchase goods in Maine, an acceptance is mailed in this state, the contract is to be governed by the laws of Maine. *Wilson v. Lewiston Mill Co.*, 150 N. Y. 314.

Contract regarding real property is to be construed *lex rei sitæ*.

Angell v. Van Schaick, 132 N. Y. 187.

When a definite meaning is conveyed by the language and no ambiguity exists in the different parts of the contract, the apparent meaning must be regarded as the intended one.

Schoonmaker v. Hoyt, 148 N. Y. 425.

An assignment of a contract for sale of wood on certain land for a conveyance of other lands, considered and construed. *Id.*

The apparent meaning of a written instrument must be regarded as the intended one when the language is unambiguous.

Christopher & Tenth St. R. R. Co. v. Twenty-third St. R. Co.
149 N. Y. 51.

A building contract providing for monthly payments "of the estimated value of the work performed on the building," construed.

Smith v. Molleson, 148 N. Y. 241.

A deed of lands supersedes a contract for the sale of the same lands, and the contract remains in force only as to provisions the deed does not contain. *Schoonmaker v. Hoyt*, 148 N. Y. 425.

A contract for the manufacture of specified dies used in making

Contracts—Continued.

gas-burners does not require that such dies should make a complete burner.

E. W. Bliss Co. v. United States Incandescent Gas Light Co., 149 N. Y. 300.

A manufacturer is not required to do more than to give notice that goods are ready for inspection, when no place of delivery is named in the contract and the guaranty of payment provides that no delivery shall be made without direction from guarantor.

Id.

The contract providing for monthly payments on account upon estimates by the engineer, *held*, that an opinion of the engineer that the contract allowed equitable cross-sections in excess of the amount of excavation required for the tunnel and its lining, together with payments for some months in accordance with that view, did not bind the city to the allowance and that contractors could not retain the excess.

O'Brien v. Mayor, etc., of N. Y., 139 N. Y. 534.

Though the contract provided for extra work upon the condition that it was authorized by the aqueduct commissioners in writing, with a certificate that it was for the public interest, *held*, that the contractors could not recover for work directed by the commissioners to remedy defects.

Id.

The statute limiting the liability of the city to the terms of the contract, *held*, that the contractors could not recover for extra cost claimed to have been caused by erroneous grades.

Id.

Held, also, that to entitle the contractors to avail themselves of the fact that they had received no final certificate, they must show that there was no amount due above what they had received.

Id.

An architect's certificate made after the commencement of an action does not affect its admissibility in evidence when the contract does not make the certificate an indispensable condition of maintaining the action.

Gillies v. Manhattan Beach Improvement Co., 147 N. Y. 420.

An agreement by joint purchasers of land to pay broker who negotiated the purchase a certain sum per acre, construed.

Johnson v. Sirrett, 153 N. Y. 51.

Parol evidence is admissible to show that the person who made the contract was an agent and not a principal.

Brady v. Nally, 151 N. Y. 258.

When the fact that the contract was for one year was established by the pleadings.

Solomon v. Vallette, 152 N. Y. 147.

Circumstances under which *held* that there was no agreement on the part of licensee to furnish the inventor with means of making and continuing experiments.

Berry Harvester Co. v. Walter A. Wood Mowing & Reaping Machine Co., 152 N. Y. 540.

Contracts—Continued.

When a beneficiary cannot be heard to attack the authority of executors to enter into a contract setting apart real estate as part of the trust funds. *Stevens v. Melcher*, 152 N. Y. 551.

A contract making the decision of the architect final as to the construction and meaning of the drawings and specifications, *held*, not to make him final arbiter of the question as to whether the work was done according to contract.

Schillinger Fire Proof Cement & Asphalt Co. v. Arnott, 152 N. Y. 584.

What may be considered as an admission by a contractor that a subcontractor has substantially completed his work. *Id.*

Where a patent is used for a purpose not embraced in the contract permitting its use, but such use is made with the patentee's consent, he is entitled to recover the reasonable value thereof.

Giffin v. White, 142 N. Y. 539.

Where plaintiff having charge of the work was to be paid out of the surplus, he is not entitled to his commission where the work results in a loss.

Camp v. Treanor, 142 N. Y. 478.

The natural sense in which words are used always prevails over punctuation and capitals.

Kinkele v. Wilson, 151 N. Y. 269.

The general rule which excludes evidence of parol negotiations which tend to contradict a written instrument applies only in controversies between the parties to the instrument.

Hankinson v. Vantine, 152 N. Y. 20.

Parol evidence inadmissible to vary a written instrument may be admitted unless objected to.

Brady v. Nally, 151 N. Y. 258.

Parol evidence is admissible to prove the purchase price agreed upon even though the memoranda contains figures which might be deemed such purchase price.

Emmett v. Penoyer, 151 N. Y. 564.

A contract will be construed according to the law of this state where the record in an action upon a foreign contract does not show the law of that state.

Bath Gas Light Co. v. Claffy, 151 N. Y. 24.

An agreement for the use of an invention upon machines manufactured and for the payment of a royalty is not so entire that a previous judgment exhausted the whole right of action upon the contract.

Skinner v. Walter A. Wood Mowing & Reaping Machine Co., 140 N. Y. 217.

One party to a tripartite contract cannot take advantage of a stipulation, express or implied, which runs only between the other two parties.

Id.

When language is used which does no more than express in terms the same obligations which the law raises from the facts of the transaction itself, the party using the language is no further bound than he would have been without it.

Young v. Leary, 135 N. Y. 569.

Contracts—Continued.

When the rule of construction that where a general intention is expressed and also a particular intention incompatible therewith, the latter may be considered in the nature of an exception, does not apply. *Spofford v. Pearsall*, 138 N. Y. 57.

A provision in a written contract for sinking the iron piles of a bridge, that the contractor agrees "to put all iron in place in thirty days after sufficient iron has been delivered, and provided that the iron is delivered in regular order and quantity, and that the floor is laid as fast as required for the erection of the iron." *Case v. Phoenix Bridge Co.*, 134 N. Y. 78.

A provision in a dissolution agreement between partners that they will "continue to hold as tenants in common" a particular debt due the firm, merely continues their interest.

Preston v. Fitch, 137 N. Y. 41.

A further provision on the part of one partner to assume liabilities, does not apply to his disbursements subsequently incurred as surviving partner. *Id.*

Effect of stipulation on a contract to construct a section of the new Croton aqueduct under Laws 1883, chapter 490, considered.

O'Brien v. Mayor, etc., of N. Y., 139 N. Y. 543.

A provision in a contract for state legislative printing that "It is further understood and agreed that in the event of an extra session of the legislature the said work shall be done and materials furnished for the prices stated in detail in the alternative bid annexed; and the same prices shall also be paid for any work and materials ordered, not for the use of the legislature," construed. *Parmenter v. State of N. Y.*, 135 N. Y. 154.

Where a plaintiff rests upon his contract and claims a liability in the defendant to make payments by force of its terms, it is competent for the defendant to show that the contract has been mutually rescinded. *Brusie v. Peck Bros. & Co.*, 135 N. Y. 622.

The object of the law in tolerating some contracts in restraint of trade is to secure the purchaser of the goodwill of a trade or business a guaranty against competition of the former proprietor. *Greenfield v. Gilman*, 140 N. Y. 168.

An agreement made with a former partner not to practice medicine or surgery within prescribed limits is not broken by attendance with other physicians upon a dying person for which no fee was charged. *Id.*

An agreement not to engage in the occupation of a pharmacist does not preclude a party from engaging in the occupation of a physician. *Id.*

An agreement for permission to occupy part of a store to carry on a business is broken by such a change as renders such occupation impracticable and unprofitable.

Dickinson v. Hart, 142 N. Y. 183.

To make a contract a personal one, requiring individual perform-

Contracts—Continued.

ance by the contracting party, the contract must itself show that a personal confidence was reposed.

Nixon v. Zuricalday, 144 N. Y. 300.

An agreement to allow certain persons a rebate if they purchase a specified amount of goods at an auction sale is not a personal contract. *Id.*

The use of the trolley system by one of the parties to an agreement between railroad companies as to the use of tracks is not the use of steam as a motive power.

Prospect Park & Coney Island R. R. Co. v. C. I. & B. R. R. Co., 144 N. Y. 152.

The giving of a lease of all its franchises by the owner of the tracks to a rival of the other party to the agreement, does not justify a breach of the agreement by the other party. *Id.*

A contract for the purchase of railroad ties, "to be counted and paid for before put in the river," discussed.

Larrowe v. Lewis, 128 N. Y. 593.

A provision permitting a person to act as superintendent of work to be done does not authorize him to alter the component parts nor depart from the plans.

Fitzgerald v. Moran, 141 N. Y. 419.

Provision in a contract for the sale of land that "said property shall be free and clear from all incumbrances and right of dower except an incumbrance of \$5,800, to be cleared at time of delivery of deed," is not ambiguous.

House v. Walch, 144 N. Y. 420.

Parol evidence is not admissible to explain or limit the word "incompatibility" used in a contract of employment.

Gray v. Shepard, 147 N. Y. 177.

An assignment by a debtor of certain claims in his favor does not operate in favor of a creditor as to notes discounted after the date of the assignment.

Pendergast v. Greenfield, 127 N. Y. 23.

The rule that no claim in respect to performance can be made after a rescission of the contract while in the course of performance does not apply where the agreement of rescission expressly or impliedly reserves such claim.

Mayor v. New York Refrigerating Construction Co., 146 N. Y. 210.

IV. PERFORMANCE.

The rule which requires the prompt rejection of goods that do not conform to the terms of an executory contract does not apply to the manufacture of articles from materials furnished to the manufacturer by the other party to the contract.

Mack v. Snell, 140 N. Y. 193.

Mere retention after delivery and failure to offer to return after

Contracts—Continued.

discovery of defects is no answer to the defense that the manufacturer has not performed his contract. *Id.*

It is proper to admit in an action upon a contract evidence of a waiver of performance. *Thomson v. Poor*, 147 N. Y. 402.

A substantial performance of the terms of an agreement is sufficient. *Oberlies v. Pullinger*, 132 N. Y. 598.

An agreement not to enter into the same line of business is not violated by the promiser engaging in a business requiring material formerly made by him.

Buck v. Ringler, 129 N. Y. 656.

The termination of a contract cannot be made by party acting in bad faith.

Johnson v. Union Switch & Signal Co., 129 N. Y. 633.

A party is not in default who has obtained an oral consent to an extension of time for the performance of a contract.

Thomson v. Poor, 147 N. Y. 402.

Performance is not excused by the act of a party which does not enable him to observe the terms of a contract.

Wells v. Alexander, 130 N. Y. 642.

If a notice was requisite to the proper performance of a contract, the court would infer the existence of a covenant to give such notice. *Id.*

It is not a breach of contract to refuse to deliver an installment of goods until prior installments are paid for, when contract provides for such payment. *Raabe v. Squier*, 148 N. Y. 81.

Where the contract called for first-class material and there was a failure to substantially perform, judgment cannot be recovered.

Boughton v. Smith, 142 N. Y. 674.

Where plaintiff contracted to build a house and charge at the cost for which he received vouchers, the vouchers furnished were *prima facie* evidence to show performance.

Blazo v. Gill, 143 N. Y. 232.

What facts do not justify abandonment of work under contract to excavate and dredge. *Cronin v. Tebo*, 144 N. Y. 660.

V. WHAT EXCUSES PERFORMANCE.

A party is released by failure of contracting party to observe terms of agreement. *Thomas v. Stewart*, 132 N. Y. 580.

One undertaking the performance of work is held to a knowledge thereof. *Id.*

A refusal of an architect based on an unreasonable requirement is no protection to the owner. *Id.*

A party is released from a contract by the offer of terms changing it as first agreed upon. *Bernstein v. Mech*, 130 N. Y. 354.

A subcontractor is excused from performance when the subcontract was made without owner's consent and he interferes with subcontractor. *Dolan v. Rodgers*, 149 N. Y. 489.

Contracts—Continued.

Failure of a party to a contract to carry out his agreement to deposit bonds in order to enable another party to a contract to purchase stock, considered.

Stokes v. Stokes, 148 N. Y. 708.

Where the court finds there was no omission in an action to reform a contract alleged to have been made by mistake, a refusal to allow an amendment to the complaint is harmless.

Christopher & Tenth St. R. R. Co. v. Twenty-third St. R. Co., 149 N. Y. 51.

A party signing a blank form is not bound by the obligations subsequently written therein unless it is shown that he gave the person who wrote it authority.

Richards v. Day, 137 N. Y. 183.

Where the vendees of goods, consenting to the sale, waive full performance.

Brady v. Cassidy, 145 N. Y. 171.

Failure to pay an installment due upon a construction contract absolves the contractor from further performance while the default continues, though it does not entitle him to recover prospective profits.

Wharton & Co. v. Wench, 140 N. Y. 287.

The contractor may at once rescind and recover for materials furnished and services rendered.

Id.

Or he may proceed with performance, and at the same time bring suit to recover the past due installment.

Id.

Prospective profits may be recovered, where the employer abandons the contract, but the contractor does not, as damages.

Id.

A contract which guaranteed the payment of dividends for a period of seven years is terminated by the dissolution of the corporation, in an action by the attorney-general for which neither party was responsible.

Lorillard v. Clyde, 142 N. Y. 456.

Where the parties seeking to enforce the guaranty, themselves procure the action to be brought for dissolution, and the grounds alleged are not in violation of the public interest, they cannot avoid the effect of such dissolution upon the ground that it was brought about by defendant's own misconduct.

Id.

The death of a person, or the destruction of a thing upon whose continued existence the performance depended, puts an end to the obligation.

Id.

Substantial performance must be established in order to entitle the party claiming the benefit of a contract to recover.

Miller v. Benjamin, 142 N. Y. 613.

Whether, in a particular case, defects or omissions are substantial or not, is generally a question of fact.

Id.

Where goods slightly differing from the order were delivered, and, upon their return, other goods of the proper grade were

Contracts—Continued.

sent, and it did not appear that any damage resulted, a finding of performance is warranted. *Id.*

VI. REMEDY FOR NON-PERFORMANCE.

The measure of damages for a breach of contract of sale of perishable goods is the difference between the cost of manufacture and the contract price. *Todd v. Gamble*, 148 N. Y. 382.

Where a contract for board and lodging provides that there shall be "no deduction in case of absence," the measure of damage is the contract price. *Wilkinson v. Davies*, 146 N. Y. 25.

Action will not lie against assignee of patent whose assignor covenanted not to license but to manufacture article in favor of license. *Mayer v. Hardy*, 127 N. Y. 125.

A contractor can only recover an increased expense by showing that an authorized deviation rendered the work more expensive, and his recovery should be limited to the difference.

Nason Mfg. Co. v. Stephens, 127 N. Y. 602.

When a party who performs services, though work is not completed in the contemplated manner, may recover for services in connection with the reorganization of a railroad.

Babbitt v. Gibbs, 150 N. Y. 281.

What qualities a contract must have to authorize a court to decree specific performance. *Stokes v. Stokes*, 148 N. Y. 708.

Measure of damages for breach of contract discharging employe who has a contract requiring a week's notice and a week's extra pay. *Watson v. Russell*, 149 N. Y. 388.

A contract for the sale of stock, on condition of non-interference of the court with contemplated increase of capital stock, upon non-fulfillment of the contract or prevention of conditions entitles vendee to consider contract as of no effect and recover the purchase money. *Lovell v. Jacobs*, 150 N. Y. 84.

Proof of mistake must be of a most substantial character to authorize reformation of a contract.

Christopher & Tenth St. R. R. Co. v. Twenty-third St. R. Co., 149 N. Y. 51.

A contractor has no action against a city for damages for delay caused by the rejection of materials.

Montgomery v. Mayor, 151 N. Y. 249.

It seems that an owner, who agrees with the contractor to furnish materials, or within certain time to perform certain construction which is necessary to the performance of the work by the contractor, is liable for delay in such construction.

Case v. Phœnix Bridge Co., 134 N. Y. 78.

Breach of contract by contractors does not authorize the owner to pay any amount he may choose for the work, and hold the contractors for the excess.

Charlton v. Scoville, 144 N. Y. 691.

Contracts—Continued.

When specific performance of a contract will not be refused on the ground that there is a change of conditions, which unfavorably affects one of the parties.

Prospect Park & Coney Island R. R. Co. v. C. I. & B. R. R. Co., 144 N. Y. 152.

The proprietor of a cheese factory is not liable for damages to his customers, from the destruction of milk and cheese through fire which destroyed the factory, in the absence of negligence.

Stewart v. Stone, 127 N. Y. 500.

VII. RESCISSION.

One who attempts to rescind a transaction, on the ground of fraud, is not required to restore that which in any event he would be entitled to retain, either by virtue of the contract sought to be set aside, or of an original liability.

Kley v. Healey, 127 N. Y. 555.

What facts do not constitute a rescission of a contract, and what constitutes a ratification of a prior contract, to avoid claim of duress.

Oregon Pacific R. R. Co. v. Forrest, 128 N. Y. 83.

When a contract for the sale and delivery of goods has been rescinded, it is not reinstated by subsequent deliveries.

DeKlyn v. Silver Lake Ice Co., affirmed without opinion, 128 N. Y. 582.

An annulment of a contract in pursuance of its terms is not a rescission which destroys all rights of action.

Mayor v. New York Refrigerating Construction Co., 146 N. Y. 210.

Where property is given in part payment of sale of goods, the buyer is entitled to its return upon rescission by the seller.

Brewster v. Wooster, 131 N. Y. 473.

In rescinding a contract a person is supposed to intend a severance of the contractual relation.

Id.

VIII. VALIDITY.

An agreement not to communicate a recipe to any other person, or engage in the business of manufacturing or vending the articles in question for a period of five years, is not opposed to public policy as in restraint of trade.

Tode v. Gross, 127 N. Y. 480.

An agreement tainted with fraud is invalid.

McIntyre v. Buell, 132 N. Y. 192.

A contract by an insurance adjuster to purchase damaged goods in his own interest is not void.

Id.

During its existence the terms of a contract govern the action of the parties.

Saltus v. Belford Co., 133 N. Y. 499.

A contract for erection of buildings in the "immediate neighborhood" is not void for indefiniteness.

Lewis v. Gollner, 129 N. Y. 227.

Contracts—Continued.

An agreement which partially supplants a former agreement is valid. *Goodsell v. Western Union Tel. Co.*, 130 N. Y. 430.

A notice of repudiation by a competent officer will justify a party in regarding a contract as broken. *Id.*

An oral promise to pay without consideration is void. *Tolhurst v. Powers*, 133 N. Y. 460.

What is not sufficient to take a parol agreement for sale of land out of the statute of frauds.

Cooley v. Lodell, 153 N. Y. 596.

Residence by a married woman with her husband is not such possession of the premises as will authorize an enforcement of his parol agreement to convey them to her. *Id.*

Payment of the consideration is not alone sufficient to take a parol agreement for sale of real estate out of the statute. *Id.*

Improvements must be substantial and permanent to take agreements out of the statute. *Id.*

An agreement by owners of a building, to a contractor furnishing materials, to pay for materials out of moneys going to contractor, if latter is not within the statute of frauds.

Raabe v. Squier, 148 N. Y. 81.
An agreement between stockholders to keep their stock for certain period, under certain conditions, is not void.

Williams v. Montgomery, 148 N. Y. 519.
Contract held void as against public policy which deprived persons of employment unless they became members of a certain organization. *Curran v. Galen*, 152 N. Y. 33.

When an instrument, procured by fraud, executed by a party in such a state of intoxication as to be incapable of consenting or contracting, is invalid as between the parties to the transaction.

Page v. Krekey, 137 N. Y. 397.
It seems that if the party actually signed the paper, though procured to do so by fraud, and is chargeable with negligence, he is liable to an innocent party. *Id.*

Where competition threatens, it is not illegal to persuade the competitor to abandon his enterprise and enter the business of another corporation at a fixed compensation.

Oakes v. Cattaraugus Water Co., 143 N. Y. 430.
Contracts which provide for services in drafting a bill and explaining it to a legislative committee, or a member thereof, and to have it introduced fairly and openly are not illegal.

Chesebrough v. Conover, 140 N. Y. 382.
An agreement, made by a deputy sheriff on his appointment, to pay to the sheriff a part of the fees is void.

Deyoe v. Woodworth, 144 N. Y. 448.
When an executed contract is valid without a consideration, discussed.

Oregon Pacific R. R. Co. v. Forrest, 128 N. Y. 83.

Contracts—Continued.

An action to affirm a contract, conceded to be illegal and to avoid the imposition of certain penalties, cannot be maintained.

Phoenix Bridge Co. v. Keystone Bridge Co., 142 N. Y. 425.
Such party might maintain an action upon disaffirmance to recover back moneys paid. *Id.*

An agreement by heirs of full age to hold the land inherited as joint tenants with right of survivorship, to be effected by devise on part of any who might dispose of their interests by will, is valid. *Murphy v. Whitney*, 140 N. Y. 541.

So long as the heirs may convey an absolute title it does not violate the statute against suspension of alienation. *Id.*

An heir who has a remainder vested under such an agreement can maintain an action to enjoin a division of the property attempted by the last survivor. *Id.*

It is no objection that he was not a party to the agreement, it having been made for his benefit. *Id.*

Contribution ; *See Joint Debtor ; Ships and Vessels ; Surety.*

Controversy, Submission of ; *See Practice.*

Conversion ; *For Equitable Conversion, See Devise.*

Transfer to general assignee by debtor of goods covered by chattel mortgage void for want of refileing authorized assignee to recover goods from sheriff. *Bowditch v. Page*, 153 N. Y. 104.

Demand by the assignee of a firm, and refusal, is sufficient basis for a suit for conversion of partnership property.

Heald v. Van Siclen, affirmed without opinion, 128 N. Y. 612.

A sheriff, levying on money in hands of assignee, though the latter draws the money from the bank and lays it upon a table, is liable for conversion. *McAllister v. Barley*, 127 N. Y. 583.

An action for conversion cannot be maintained unless the plaintiff is entitled to the immediate possession of the property.

Deely v. Dwight, 132 N. Y. 59.

Such an action will not lie to enforce an equitable lien against the owner of a legal title. *Id.*

A judgment creditor and his sureties in a bond of indemnity given to the sheriff are jointly and severally liable.

Dyett v. Hyman, 129 N. Y. 351.

Proof that the ultimate benefit of the property will be in the plaintiff can only be set up where he has the general property. *Id.*

The rights of the parties must be determined on the facts existing when action is brought.

Moore v. Prentiss Tool & Supply Co., 133 N. Y. 144.

Conversion—Continued.

One who assigns wages, agreeing to act as servant, if he does receive them, in case he collects the money and fails to pay over the same, is liable for conversion, and a body execution may be issued under section 3026 of the Code.

Farrell v. Hubbard, 148 N. Y. 592.

Until after a demand on a bank, and the refusal by it to pay the proceeds of a check, it cannot be liable for conversion when it receives the draft in payment of a check for collection.

Castle v. Corn Exchange Bank, 148 N. Y. 122.

Conveyances; *See Assignments*; *Champerty*; *Deeds*; *Fraudulent Conveyances*; *Husband and Wife*; *Mortgages*; *Voluntary Conveyances*.

Conviction; *See Criminal Law*.

Cornell University; *See Colleges*.

Coroner.

A coroner is not entitled to salary where he retains fees received while acting as sheriff.

People ex rel. Schultz v. Myer, 131 N. Y. 644.

Corporations; *See Banks and Banking*; *Benevolent Associations*; *Building Associations*; *Constitutional Law*; *Foreign Corporations*; *Electric Light Companies*; *Insurance*; *Manufacturing Corporations*; *Municipal Corporations*; *Plank Road Companies*; *Railroads*; *Religious Associations*; *Steamboat Companies*; *Taxation*; *Turnpike Companies*.

I. INCORPORATION AND FRANCHISES.

II. STOCK, STOCKHOLDERS AND CAPITAL.

III. OFFICERS AND AGENTS.

IV. POWERS.

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I. INCORPORATION AND FRANCHISES.

The difference between joint-stock companies and corporations discussed. *People ex rel. Winchester v. Coleman*, 133 N. Y. 279.
An agreement for the purchase of land, made prior to the filing

Corporations—Continued.

of the certificate of incorporation, is ratified by subsequent acceptance of the deeds.

Seymour v. Spring Forest Cemetery Ass'n, 144 N. Y. 333.

A corporation organized under an unconstitutional statute is a corporation *de facto*, and may be dissolved.

Coxe v. State, 144 N. Y. 396.

A corporation organized under the Manufacturing Act of 1848 is not subject to the prohibition against the declaration of a dividend except out of surplus.

People ex rel. Edison General Electric Co. v. Barker, 141 N. Y. 251.

Persons seeking to form a corporation must comply with the requirements of the statute in preparing articles of incorporation, and may insert other provisions not inconsistent with law.

People ex rel. Fairchild v. Preston, 140 N. Y. 549.

The bestowal of corporate powers is equivalent to creation of a corporation. *People ex rel. Winchester v. Coleman*, 133 N. Y. 279.

Statutes for consolidation of domestic corporations are to be treated as acts of incorporation.

People v. N. Y., Chicago & St. Louis R. R. Co., 129 N. Y. 474.

But otherwise where the corporations are not all domestic. *Id.*

Whether such consolidation would be a new corporation *de jure*—*quære?* *Id.*

Organization tax does not apply to aggregate capital upon consolidation with foreign corporations. *Id.*

Under Laws 1890, chapter 566, section 60, authorizing incorporation for manufacturing gas "or" electricity, both purposes may be united in the same certificate.

People ex rel. Municipal Gas Co. v. Rice, 138 N. Y. 151.

Where the company sought to exchange its stock for that of an electric light company, in effect merging the business and franchises of the two, *held*, that this could be accomplished by an amendment to its certificate without consolidation, under Laws 1890, chapter 566; Laws 1892, chapter 691. *Id.*

Subsequent corporate acts tending to manifest an illegal proposition on the part of the directors do not invalidate the incorporation, where the certificate of incorporation expresses no illegal proposition on the part of the directors.

United States Vinegar Co. v. Foehrenbach, 148 N. Y. 58.

In an action upon a stock subscription it is not available to reply that a portion of the capital stock was subscribed by the corporation *ultra vires*. *Id.*

Although a provision of a corporate charter provides "all rights, and privileges hereby granted shall be null and void" in a certain event, the attorney-general must bring the action as provided by the statute.

New York & Long Island Bridge Co. v. Smith, 148 N. Y. 540.

Corporations—Continued.

Section 30 of chapter 564 of 1890 to the annual report of corporations was not merged in chapter 2 of 1892, etc.

Bank of Metropolis v. Faber, 150 N. Y. 200.

Public policy does not forbid a corporation, organized under general laws of another state, and a certificate, executed in due form, that the statutory requirements had been complied with, from doing business in this state.

Demarest v. Flack, 128 N. Y. 205.

The election of non-resident directors without a resolution permitting would not *ipso facto* dissolve the corporation. *Id.*

What was sufficient evidence of user. *Id.*

What neglect of a railroad corporation to exercise all its franchises terminates its corporate existence, how such forfeiture is procured by the attorney-general, under Code Civil Procedure, section 1798.

People v. Ulster & Delaware R. R. Co., 128 N. Y. 240.

Such actions are not even then maintainable unless public interest is involved. *Id.*

An action thus commenced is also within the control of the state. *Id.*

It is incumbent upon the state to show upon trial that a cause of forfeiture had not only been incurred, but that it continued to exist. *Id.*

When two corporations which had paid the tax on organization are afterwards consolidated, a new tax on capital is necessary.

People ex rel. New York Phonograph Co. v. Rice, affirmed on opinion, 128 N. Y. 591.

What will be regarded as a violation or non-user of an additional franchise.

People v. Broadway R. R. Co., of Brooklyn, with opinion of Court of Appeals, 126 N. Y. 29.

An action will not lie in the name of the people to forfeit the franchise of a street railway for failure to construct its tracks. *Id.*

The enactment of a special statute, and the acceptance of the privileges thus conferred by the company, do not modify the original charter of the company so as to make the statute a part of it. *Id.*

Although a statute be permissive, yet if a company accepts the privileges conferred, it becomes at once amenable to law conferring them. *Id.*

II. STOCK, STOCKHOLDERS AND CAPITAL.

Certificates of stock of a business corporation are not possessed of complete negotiability as commercial paper.

Know v. Eden Musee American Co., 148 N. Y. 441.

Corporations—Continued.

When a certificate is lost, the owner may recover possession from a *bona fide* purchaser. *Id.*

The stock of a corporation covers its capital, surplus and franchises.

People ex rel. Union Trust Co. v. Coleman, 126 N. Y. 433.
The court may grant the right to examine the books before election to a stockholder.

People ex rel. Stobo v. Eadie, 133 N. Y. 573.
The court may in its discretion allow such examination at other times. *Id.*

Where owners of lands organize a corporation for its management as a cemetery, of which they are sole stockholders, and convey the land to it in exchange for corporate bonds, the fact that the land was not worth the sum secured is immaterial, as the transaction is, in substance, simply a change in the manner of holding the land.

Seymour v. Spring Forest Cemetery Ass'n, 144 N. Y. 333.
A person who has subscribed for stock, but received no certificate, is not entitled to stock in a new corporation after consolidation, until his certificate of stock in the old corporation is produced.

Babcock v. Schuylkill & Lehigh Valley R. R. Co., 133 N. Y. 420.

The unauthorized purchase of stock in another's name does not constitute the latter a stockholder, though the stock is paid for, when the purchase is promptly repudiated.

Glenn v. Garth, 133 N. Y. 18.
Provisions regarding transfer of stock do not prevent the passing of the entire title as between the parties.

Chemical Nat. Bk. v. Colwell, 132 N. Y. 250.
Where a foreign statute gives a corporation power to hold, purchase and sell real estate, it may deal in the purchase and sale of real estate.

Lancaster v. Amsterdam Improvement Co., 140 N. Y. 576.
Where such corporation acquires real estate in this state, its subsequent conveyance is unimpeachable upon the ground of abuse of powers conferred, and where such conveyance is not prohibited expressly by the statutes of the state. *Id.*

Capital stock can only be increased in the particular manner authorized by its charter or by statute.

Einstein v. Rochester Gas & Electric Co., 146 N. Y. 46.
What does not amount to an increase of the capital stock of a corporation. *Id.*

Refusal by personal representative of deceased to pay installments within the time limited, bars rights of the representative and his assigns.

Dow v. Iowa Central R. Co., 144 N. Y. 426.
A stockholder is not entitled to intervene as a party defendant

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where stock has been held a long time, as acquiescence after such lapse of time will be presumed.

Warren v. Bigelow Blue Stone Co., 142 N. Y. 669.

An equitable action to compel the issuance of stock is not prevented by the provisions of statute authorizing the court upon summary application to make an order requiring the issuance of a new certificate.

Kennan v. Forty-second St. & C. Ry. Co., 140 N. Y. 183.

Though one has been defeated in an action against the corporation, where the assignee of a stockholder pays the costs awarded, he is entitled to the issue of a new certificate.

Cassagne v. Marvin, 143 N. Y. 292.

Scrip issued by the corporation in payment of the greater part of the consideration for the purchase of its lands, and receivable by it to the extent of three-fourths of the value of lands sold, was, pursuant to a prior arrangement and understanding of the promoters, to be first protected out of the proceeds of land sales to the prescribed extent. *Held*, that the corporation held such proceeds as trustees for the scripholders.

Rogers v. N. Y. & Texas Land Co., 134 N. Y. 197.

A company having bought scrip with funds applicable to its redemption could not re-issue the same in the form of a dividend.

Id.

Stock and bonds in a competing company, bought pursuant to section 40 of the Stock Corporation Law, cannot be used by the purchaser for the purpose of destroying the property of the stockholders of the other company.

Farmers' Loan & Trust Co. v. New York & Northern R. Co., 150 N. Y. 410.

The rights of minority stockholders of the company, the majority of whose stock has been purchased by the competing company, considered and determined.

Farmers' Loan & Trust Co. v. New York & Northern R. Co., 150 N. Y. 410.

It is conclusive when a jury determines the question of the genuineness of certificates of stock.

Jarvis v. Manhattan Beach Co., 148 N. Y. 652.

III. OFFICERS AND AGENTS.

The discretion of the trustees, when acting in good faith, cannot be disturbed.

McNab v. McNab & Harlin Mfg. Co., 133 N. Y. 687.

A stockholder who accepted his share of the profits of a transaction cannot be heard to claim it as *ultra vires*.

Id.

A single past transaction of investment in government bonds, though detrimental, did not call for the interference of a court of equity.

Id.

Corporations—Continued.

An objecting stockholder cannot maintain an action where an officer of a corporation offered to personally assume the expense of a transaction. *Id.*

Where there is no evidence of a preconcerted plan in the increase of salaries on the part of those voting for it, such action is legal. *Id.*

A director is released from liability where he disposes of the beneficial interest in his stock with the knowledge of the corporation. *Nat. Bank v. Colwell*, 132 N. Y. 250.

The mere fact that the person making a statement of assets and liabilities of a corporation was the president thereof, does not warrant an inference that such statement is given upon his personal knowledge. *Kountze v. Kennedy*, 147 N. Y. 124.

President of a corporation who purchased its notes with knowledge that they were issued for a purpose which was *ultra vires* is not a *bona fide* holder. *McClure v. Levy*, 147 N. Y. 215.

Where a party had made no claim for salary as president of an insurance company which had transferred its business to another company, he cannot claim, where he has been made manager of the new company, a salary as president.

Simonson v. N. Y. City Ins. Co., 141 N. Y. 12.

The fact that a transferee, with knowledge of the agreement, holds the stock subject to the possible enforcement of the agreement in equity, in no way interferes with his legal title.

Matter of Argus Co., 138 N. Y. 557.

It does not affect the right of stockholders to petition in a summary proceeding to establish an election of officers under section 27 of the General Corporation Act of 1892, that they joined the corporations as one of the petitioners without authority. *Id.*

The receipt of illegal votes, at an election of the officers of a corporation, in favor of a candidate who has also received a majority of the legal votes, does not defeat his election. *Id.*

An agreement between stockholders controlling the majority of the stock of a corporation, that none would sell any of his shares without giving the other parties to the agreement an opportunity to purchase, does not disable a party thereto from vesting legal title in another by a transfer. *Id.*

The word "employee" in chapter 376 of 1885, giving preference to wages of employes, defined.

Palmer v. Van Santvoord, 153 N. Y. 612.

Who is an employe within the meaning of such act. *Id.*

Where a director in a corporation for whose debt a note was given was also a director in the bank which discounted it, but in no way acted for the bank in the matter, his knowledge was not imputable to the bank.

Casco Nat. Bk. v. Clark, 139 N. Y. 307; s. c., *Merchants' Nat. Bk. v. Clark*, 139 N. Y. 314.

Corporations—Continued.

A corporation, by designating an agent in another state upon whom proceedings may be served, does not thereby change its residence.

Douglass v. Phoenix Ins. Co., 138 N. Y. 209.

What is sufficient to sustain a finding of the existence of the contract to pay president a certain salary.

Farmers' L. & T. Co. v. Housatonic R. R. Co., 152 N. Y. 251.

IV. POWERS.

When a corporation is liable to a *bona fide* holder of a certificate of its stock for loss sustained in its purchase.

Fifth Ave. Bk. v. Forty-second St., etc., R. R. Co., 137 N. Y. 231.

The rule that "when certificates of stock contain apparently all the essentials of genuineness, a *bona fide* holder thereof has a claim to recognition as a stockholder, if such stock can be legally issued, or to indemnity if this cannot be done. The fact of forgery does not extinguish his right, when it has been perpetrated by or at the instance of an officer, placed in authority by the corporation and entrusted with the custody of its stock books, and held out by the company as the source of information on the subject. *Id.*

A director of a corporation owes it no duty to buy in its unmat-
tured obligations for its benefit, and may purchase them at any sum. *Seymour v. Spring Forest Cemetery Ass'n*, 144 N. Y. 333.

A by-law of a press association, which prevents its members from receiving or publishing regular news dispatches of any other news association covering a like territory, is legal.

Matthews v. Associated Press of N. Y., 136 N. Y. 333.

Whether such by-law would be enforceable against a member who was also a member of a like association at the time of its passage,—query. *Id.*

The rule that in the case of a corporation, exercising a delegated authority for the public benefit, the actionable quality of a private injury resulting therefrom may depend upon the legislative will, does not extend to acts which are *ultra vires*.

Hudson River Telephone Co. v. Watervliet Turnpike & Ry. Co., 135 N. Y. 393.

It seems, therefore, that a telephone company occupying a city street with its wires may question the right of a street railway company to use an electric system for propelling its cars to the detriment of the business of the former. *Id.*

Where, for any reason, the stock book of a corporation is inaccessible for the purposes of making transfers of stock, the directors may adopt a new one. *Matter of Argus Co.*, 138 N. Y. 557.

A meeting of the directors of a corporation, at which the ordinary business of the corporation is to be considered, may be called by a general notice. *Id.*

Corporations—Continued.

The trustees of a corporation cannot so dispose of its property as to virtually end its existence. *People v. Ballard*, 134 N. Y. 269. Such attempted disposition of the corporate property, even if in good faith, is an illegal act. *Id.*

A manager who has received certificates of stock from the president of the corporation with instructions to cancel them cannot reissue them. *Knox v. Eden Musee American Co.*, 148 N. Y. 441.

Although the officers of a corporation surrendered certificates for cancellation to a manager who disposes of them, they may challenge their validity in the hands of a *bona fide* purchaser. *Id.*

Executive committee may transact business of corporation between meetings of the directors and delegate persons to one of such committee.

Sheridan Electric Light Co. v. Chatham Nat. Bk., 127 N. Y. 517.

A *bona fide* pledger of a receipt issued by the president of a warehouse company in his own favor must show that implied authority to issue receipts for his own goods had been conferred on him.

Hanover Nat. Bk. v. American Dock & Trust Co., 148 N. Y. 612.

Such authority may be shown by acquiescence of the directors in previous similar actions. *Id.*

A manufacturing corporation has power, with the consent of all its stockholders, to sell its plant and machinery to another corporation and to retire from business, taking the stock of the latter in payment therefor.

Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252.

The vendor corporation, having taken such stock, may sell the same, and a note taken therefor is not subject to defense of *ultra vires*. *Id.*

V. LIABILITIES.

The liability for failure to file certificate of increase of stock attaches only to the holders of the increased stock.

Griffith v. Green, 129 N. Y. 517.

Application for dissolution does not relieve trustees from filing annual report where one trustee makes affidavit that the corporation is solvent. *First Nat. Bank v. Lamon*, 130 N. Y. 366.

A finding of fact by the referee, and sustained by the General Term, will not be renewed by Court of Appeals. *Id.*

The provisions making a stockholder liable do not apply in favor of a creditor who was also a director.

McDonall v. Sheehan, 129 N. Y. 200.

Where the plaintiff was engaged by the promoter of a water com-

Corporations—Continued.

pany before its organization to secure certain privileges for it, and said promoter on its organization becomes president of the company with members of his family as principal officers, the company is liable for the amount agreed upon.

Oakes v. Cattaraugus Water Co., 143 N. Y. 430.

The filing in the office of the secretary of state of the certificate of full-paid stock of a corporation organized under the Business Corporation Act of 1875 was a sufficient compliance with the statute, though not filed in county clerk's office.

Jones v. Butler, 146 N. Y. 55.

The assets of a corporation are a trust fund for the payment of its debts.

Cole v. Millerton Iron Co., 133 N. Y. 164.

The transfer of property of one corporation to another for nominal consideration does not effect a consolidation, and is illegal. *Id.*

A creditor cannot be compelled to assent to a change of debtors. *Id.*

Transfer of property by a corporation in contemplation of insolvency is not limited to cases where the payment of an obligation has been refused. *Id.*

Judgment and appointment of receiver is no bar to creditor's suit. *Id.*

A charge that a corporation was organized for an illegal purpose cannot be sustained where it is not shown that they adopted and acted upon the prospectus issued before organization.

U. S. Vinegar Co. v. Schlegel, 143 N. Y. 537.

So long as a foreign corporation is recognized by the authorities of its own state it is entitled to some recognition here, unless it appears that it was formed for purposes illegal here. *Id.*

Where a party contracts with a corporation as such he is estopped from denying its corporate existence. *Id.*

Where the representations of a corporation director were such as to induce a stockholder to part with his stock to his loss and damage, he is entitled to recover on such loss.

Rothmiller v. Stein, 143 N. Y. 581.

The corporation cannot offer the defense that if they informed him of the corporation's condition and he sold the stock, that he would be liable for fraud. *Id.*

The report required by the General Manufacturing Corporations Act, Laws 1848, chapter 40, as amended by Laws 1875, chapter 510, must be filed as well as made out in order to exempt trustees from liability. *Whitney v. Cammann*, 137 N. Y. 342.

The rule that the statute is highly penal and to be construed accordingly, and that a party seeking to charge a director within its terms must allege and prove affirmatively every fact and circumstance upon which his right to recover depends, reaffirmed. *Id.*

It seems that if the trustees make and verify the report within the

Corporations—Continued.

time prescribed by statute, it may be filed or published as soon as practicable thereafter. *Id.*

Where a land company upon its organization accepts title to land in accordance with the scheme for which it was organized, it thereby adopts and ratifies and becomes bound by an agreement between its promoters, who were the owners of such land, and afterward its stockholders.

Rogers v. N. Y. & Texas Land Co., 134 N. Y. 197. Such corporation is charged, by the knowledge of its directors, the source of its title and the consideration paid for the land, with knowledge of the proceedings of the land owners which led to its existence. *Id.*

Liability for loss of goods shipped on line conducted by corporation as agent considered. *Linkauf v. Lombard*, 137 N. Y. 417. A corporation that had paid a note is estopped from denying the authority of the person who made it in its behalf.

Davies v. N. Y. Concert Co., affirmed without opinion, 128 N. Y. 635.

When no action lies against a corporation for any loss resulting to a lender upon a forged certificate.

Manhattan Life Ins. Co. v. Forty-second St. & Grand St. Ferry R. R. Co., 139 N. Y. 146.

The plea of *ultra vires* cannot be availed of to defend against an obligation incurred, when the contract has been in good faith performed by the other contracting party and the corporation has had the benefit of it. *Linkauf v. Lombard*, 137 N. Y. 417.

A lease which may be *ultra vires* and invalid as regards the state may be enforced between the parties.

Bath Gas Light Co. v. Claffy, 151 N. Y. 24.

When the personal liability of the directors under section 24 of the Stock Corporation Law may be enforced.

National Bk. of Auburn v. Dillingham, 147 N. Y. 603.

The right of action given under said section applies to all creditors. *Id.*

If premises leased to a corporation are vacant before the expiration of the term on the appointment of a receiver in a statutory proceeding for the dissolution of the corporation for insolvency, and the lessor, in accordance with the terms of the lease, re-enters and re-lets to a third party for the unexpired term at a less rental, the difference between the rent for the balance of the term reserved under the original lease and that reserved under the sub-letting constitutes a definitely established claim against the corporation. *People v. St. Nicholas Bank*, 151 N. Y. 592.

The situation of the receiver of an insolvent corporation is less restricted than that of an assignee under a general assignment for the benefit of creditors. *Id.*

The lessor of a building, used as a manufactory, who receives stock

Corporations—Continued.

of a corporation in place of rent, is not liable to taxation in pursuance of section 10 of the General Manufacturing Act.

Close v. Noye, 147 N. Y. 597.

Although the stock corporation law was subsequently repealed, such exemption of the rights of the holder of stock was protected by the savings clause in the Repealing Act. *Id.*

Real estate of a foreign corporation purchased with surplus earnings is not taxable as "capital stock employed within this state."

People ex rel. Singer Mfg. Co. v. Wemple, 150 N. Y. 46.

What is sufficient to put transferee on inquiry when negotiable paper made by a corporation to order of its president, indorsed by him, is presented to such transferee.

Cheever v. Pittsburg, S. & L. E. R. R. Co., 150 N. Y. 59.

Stock of foreign corporations, owned by a domestic corporation, is not subject to taxation under chapter 542 of 1880.

People ex rel. Edison Electric Light Co. v. Wemple, 148 N. Y. 690.

When a corporate seal is attached to negotiable paper, it does not lose that quality. *Chase Nat. Bk. v. Faurot*, 149 N. Y. 532.

Directors of a warehouse company were chargeable as to a *bona fide* purchaser of a receipt issued in its name with knowledge of entries in its book which could have been disclosed by inspection.

Hanover Nat. Bk. v. American Dock & Trust Co., 148 N. Y. 612.

When a broker, sued upon his own guarantee of genuineness of stock, may recover from the company whose stock was sold.

Jarvis v. Manhattan Beach Co., 148 N. Y. 652.

VI. SUITS AFFECTING.

An action for amount unpaid on stock rests upon contract, and an express or implied promise must be shown.

Glenn v. Garth, 133 N. Y. 18.

No recovery can be had where neither an express or implied promise is shown. *Id.*

An order quashing a writ of *certiorari* issued under chapter 269, Laws 1880, to review an assessment of the personal property of a corporation for taxation, is appealable to the Court of Appeals.

People ex rel. Commercial Mutual Ins. Co. v. Tax Commissioners, 144 N. Y. 483.

Where the determination of the assessors, it will not be reviewed and reversed by the Court of Appeals on *certiorari*.

People ex rel. Hecker-Jones-Jewell Milling Co. v. Barker, 147 N. Y. 31.

In a petition for a *certiorari* to review an assessment for taxation under chapter 269, Laws 1880, on the ground of irregularity,

Corporations—Continued.

only the conclusions of fact need be stated, not the evidence to support them.

People ex rel. Commercial Mutual Ins. Co. v. Tax Commissioners, 144 N. Y. 483.

Where petition in such a case sufficiently specifies the grounds of illegality. *Id.*

A petition which alleges that an assessment is illegal, invalid, void and erroneous, etc., *held*, to raise only the question of over-valuation. *Id.*

A petition for a writ of *certiorari* under chapter 269, Laws 1880, to review an assessment for taxation on the ground of illegality, must specify the particulars of the alleged illegality. *Id.*

In making an assessment of sums invested in this state by a foreign corporation, the indebtedness incurred by it in the purchase of property here, which is unpaid, is to be deducted.

People ex rel. Hecker-Jones-Jewell Milling Co. v. Barker, 147 N. Y. 31.

In assessing the personal property of a corporation, the actual value of its capital stock, and not the market value of its shares in the hands of individual owners.

People ex rel. Manhattan R. Co. v. Barker, 146 N. Y. 304.

In making such assessment it cannot be presumed that its indebtedness represents property to the amount thereof in addition to capital stock. *Id.*

Earnings of a corporation may be considered by the assessors. *Id.*

Real property of a corporation should be assessed at its actual value. *Id.*

Where the tax commissioners acted exclusively on the statement furnished by the corporation, and did not impugn any of the facts stated therein, an assessment at a greater valuation cannot be sustained.

People ex rel. Equitable Gas-Light Co. v. Barker, 144 N. Y. 638.

Where a determination by the assessors that the capital of the corporation is unimpaired is justified, they are not bound to deduct its debts. *Id.*

The assessors are not bound by the statement made to them by the corporation upon an application for reduction of the assessment. *Id.*

When a foreign corporation is not wholly engaged in carrying on manufacture, and is not exempt from taxation under chapter 542, Laws 1880, as amended in 1889.

People ex rel. Western Electric Co. v. Campbell, 145 N. Y. 587.

How the value of the real estate of a corporation for the purpose of ascertaining its capital subject to taxation is to be ascertained.

People ex rel. Equitable Gas-light Co. v. Barker, 144 N. Y. 94.

A judgment sequestering the property of a corporation cannot be

Corporations—Continued.

collaterally attacked, in an action brought by the receiver, on the ground of error in the decision as to the validity of the judgment.

Jones v. Blun, 145 N. Y. 333.

The exemption from taxation under the Corporation Tax Act of 1880, as amended in 1889, of "manufacturing corporations wholly engaged in carrying on manufacture within this state," is limited to corporations whose corporate business is exclusively that of manufacturing.

People ex rel. Tiffany & Co. v. Campbell, 144 N. Y. 166.

The fact that a manufacturing company uses a portion of its capital in a business outside of its corporate powers does not deprive it of all benefit of the exemption.

Id.

The determination of the comptroller on the question of valuation of the capital of the corporation will not be disturbed, unless clearly shown to have been erroneous.

People ex rel. Western Electric Co. v. Campbell, 145 N. Y. 587.

What is not a transfer or assignment of the property of the corporation within the meaning of section 48 of the Stock Corporation Law.

French v. Andrews, 145 N. Y. 441.

Nor does the act of the treasurer of such corporation in giving demand notes in exchange for others, to enable the creditor to procure judgments.

Id.

Act of corporation fixing the prices of commodity is sufficient to justify a finding that the corporation is a combination, and warrants a judgment of dissolution.

People v. Milk Exchange, 145 N. Y. 267.

When a stockholder may maintain an action against the directors for mismanagement.

Sage v. Culver, 147 N. Y. 241.

Complaint in an action by a stockholder against directors for violating their trust, *held*, sufficient.

Id.

Holders of bonds improperly pledged to secure prior debts are not entitled to share in the proceeds of a foreclosure of the mortgage given to secure the bonds.

Shaw v. Saranac Horse Nail Co., 144 N. Y. 220.

Where several corporations are consolidated under an agreement that payment for the transfer of their property and business should be made by an exchange of stock, such agreement is a contract, and may be enforced by original corporators against the new company.

Anthony v. American Glucose Co., 146 N. Y. 407.

The attorney-general is authorized to bring an action in the name of the people, without a relator, to remove the trustees of a domestic corporation for misconduct.

People v. Ballard, 134 N. Y. 269.

The question as to what the public interests require is committed to the absolute discretion of the attorney-general.

Id.

Where plaintiff sues as *cestui que* trust of the property in question,

Corporations—Continued.

and it appears that the issues litigated in the present action were decided in a former action, the plaintiff is estopped.

Alexander v. Donohoe, 143 N. Y. 203.

The plaintiff could not lose his claim on his rights under the trust deed since, standing as a stockholder, he affirmed the surrender of the trust certificates and did not offer to return his stock. *Id.*

A motion by one of the parties to a proceeding for dissolution of a corporation for dismissal of such proceeding is an application for a final order, and when, after all the parties have been heard, the court has jurisdiction even after an adjournment to enter an order of dissolution.

Matter of Peekamose Fishing Club, 151 N. Y. 511.

The complaint in an action to enforce a stockholder's liability for the debts of the corporation under section 10 of the Manufacturing Act of 1848, upon the ground that no certificate of payment of the capital stock was ever made or filed, need not negative the exemption from such liability, created by the amendment of 1853, in a case of stock issued for the purchase of property.

Rowell v. Janvrin, 151 N. Y. 60.

Ejectment lies against stockholder of corporation formed to erect apartment house, who was entitled to occupy apartment under conditions fixed by majority of stockholders and who did not comply with such conditions.

Compton v. The Chelsea, 128 N. Y. 537.

What sums may be recovered in an action by stockholders against directors of a corporation for losses caused by their negligence.

Bloom v. National United Benefit Savings & Loan Co., 152 N. Y. 114.

An assessment of real estate of a railroad in a town is to be based upon the cost of replacing the property within the jurisdiction of the assessors.

People ex rel. D., L. & W. R. R. Co. v. Clapp, 152 N. Y. 490.

The assessors may consider in fixing the assessment the annual report of a railroad company to the railroad commissioners.

People ex rel. Manhattan R. Co. v. Barker, 152 N. Y. 417.

Basis of assessment of the personal property of an elevated railroad company, considered. *Id.*

Circumstances under which, *held*, that a preliminary restraining order in an action by a stockholder to procure the appointment of a receiver was no excuse for the failure of a creditor to obtain a judgment against the corporation under section 24 of the act of 1848.

United Glass Co. v. Vary, 152 N. Y. 121.

When check appearing to be the one sued upon signed by the assistant treasurer of the defendant corporation is admissible as against a general objection.

Farmers' L. & T. Co. v. Housatonic R. R. Co., 152 N. Y. 251.

Corporations—Continued.

The ruling of the comptroller that a corporation was not engaged in manufacturing during a certain year is not conclusive.

People ex rel. Edison Electric Light Co. v. Campbell, 148 N. Y. 759.

An attachment is not properly made when the service of the summons is upon the person in charge of the property attached and such service is brought to the notice of the corporation.

Kieley v. Central Complete Combustion Mfg. Co., 147 N. Y. 620.

A purchaser of bonds, who knew of the misappropriation of the proceeds, cannot maintain an action upon a covenant in a mortgage.

Belden v. Burke, 147 N. Y. 542.

Subsequent purchasers of the bonds, however, without notice may have such relief.

Id.

A bondholder may maintain an action for specific performance of a provision in a bond given by organizers of the railroad that they will convey certain property to the trustee.

O'Beirne v. Alleghany & Kinzua R. R. Co., 151 N. Y. 372.

An action against a stockholder of a Kansas corporation who resides in this state cannot be maintained here to enforce his liability created by the laws of Kansas.

Marshall v. Sherman, 148 N. Y. 9.

Such action would have to be proceeded with in the same manner as provided by our statutes.

Id.

When evidence as to improper use by one corporation of the funds, stock and bonds of another may be shown in evidence in an action to foreclose the bonds of the road controlled.

Farmers' Loan & Trust Co. v. New York & Northern R. Co., 150 N. Y. 410.

It seems that an action by the attorney-general to annul an added franchise, is within the scope of the provisions of Code Civil Procedure, section 1798.

People v. Broadway R. R. Co. of Brooklyn, with opinion of Court of Appeals, 126 N. Y. 29.

The attorney-general may appropriately bring an action in accordance with the provisions of section 1798 of the Code, for the purpose of enforcing the common-law right to annul franchise.

Id.

A claim against one of a director or stockholder must be established by the application of the same rules of evidence which are applied in an action brought by an individual.

Rudd v. Robinson, 126 N. Y. 113.

VII. DISSOLUTION.

Upon voluntary dissolution the court cannot control funds placed in the hands of a trustee for a specific purpose.

Matter of Home Provident Safety Fund Asso., 129 N. Y. 288.

Corporations—Continued.

Where such funds have been ordered paid to a receiver, the court must direct their repayment. *Id.*

The receiver is not liable for payments made under direction of the court in good faith. *Id.*

The statutory method of effecting dissolution is exclusive.

Matter of Importers & Grocers' Exchange, 132 N. Y. 312.

Where the majority of members and trustees desire a dissolution, it should be ordered, though the corporation is solvent. *Id.*

Voluntary dissolution of a corporation rests upon statute and not upon the general equity powers of the court.

Matter of Binghampton General Elec. Co., 143 N. Y. 361.

Dissolution does not destroy the right of action for loss of services resulting from an injury received while in employ of the corporation.

Marsteller v. Mills, 143 N. Y. 398.

A corporation cannot cease to exist of its own will.

People v. Ballard, 134 N. Y. 269.

While a corporation may sell its property to pay debts, or to carry on its business, it cannot sell its property in order to deprive itself of existence. *Id.*

While the stockholders who consented may be estopped by their acts, those who did not consent can take advantage of this violation of their rights. *Id.*

An action to vacate a charter may be brought without a relator.

People v. Buffalo Stone & Cement Company, 131 N. Y. 140.

No act of a relator will affect the right of the people to maintain action to vacate a charter. *Id.*

The failure to file annual report is a ground of forfeiture. *Id.*

Judgment of dissolution must be awarded upon proof of failure to pay in capital stock. *Id.*

Non-user of corporate powers is a ground for dissolution.

People v. Milk Exchange, 133 N. Y. 565.

When an allowance to attorney employed to resist proceedings for the dissolution of a corporation will not be a proper claim.

People v. Commercial Alliance Life Ins. Co., 148 N. Y. 563.

An order in an action for the dissolution of a corporation directing receiver to pay the creditors' claim, is not appealable as of right to the Court of Appeals.

People v. American Loan & Trust Co., 150 N. Y. 117.

The directors of the bank cannot anticipate an action to dissolve a bank after the superintendent of banks has taken possession of the assets.

Matter of Murray Hill Bank, 153 N. Y. 199.

An action by the directors of a banking corporation for the voluntary dissolution abates upon the entry of judgment of the dissolution. *Id.*

Corporations—*Continued.*

VIII. INSOLVENCY AND RECEIVERS.

A transfer by a manufacturing company which has refused payment of its notes to a firm of which only one member is a stockholder, in payment of a debt due to the firm, is void.

Jones v. Blun, 145 N. Y. 333.

Stocks of New York banks held by a foreign insurance company, doing business in this state, are exempt from taxation by force of section 4 of chapter 679, Laws 1886.

Etna Ins. Co. v. Mayor, 153 N. Y. 331.

Chapter 679 of 1886, exempting bank stock held by foreign insurance companies doing business in this state from taxation, did not apply to the taxation for the year 1896. *Id.*

The secretary of a corporation may, after the appointment of a receiver, waive notice of protest.

Ludington v. Thompson, 153 N. Y. 499.

An action against the receiver of a corporation in form upon notes made by it, but in reality to determine whether the plaintiff is a creditor, is not barred by the Statute of Limitations where an action on a note was not barred at the time of dissolution. *Id.*

Taxes against personal property of an insolvent corporation which accrued subsequent to liens acquired by attachment are not entitled to priority of payment.

Wise v. L. & C. Co., 153 N. Y. 507.

A motion to compel payment by the receiver of the corporation of moneys improperly received by him must be upon notice of the attorney-general, and in an action in which he was appointed. *Gillig v. Geo. C. Treudwell Co.*, 151 N. Y. 552.

An action by a receiver of an insolvent corporation against its director for misapplication of assets is within the six years' limit of limitations of the old Code accrued before the new Code took effect. *Mason v. Henry*, 152 N. Y. 529.

The statute begins to run in such a case from the date of misapplication of funds. *Id.*

A temporary receiver may maintain an action to collect a judgment entered against the corporation in contemplation of insolvency. *Nealis v. American Tube & Iron Co.*, 150 N. Y. 42.

Right of preference of party who loaned money to an embarrassed corporation upon inadequate security, discussed and determined.

Farmers' Loan & Trust Co. v. Bankers & Merchants' Tel. Co., 148 N. Y. 315.

Although the time to prove debts against the estate of an insolvent corporation had expired, a creditor is entitled to *pro rata* dividends of the assets remaining undistributed.

People v. E. Remington & Sons, affirmed on opinion, 126 N. Y. 654.

Costs.

- I. WHEN ALLOWED.
- II. LIABILITY FOR.
- III. TAXATION AND REMEDIES.
- IV. EXTRA ALLOWANCE.
- V. COSTS ON APPEAL.
- VI. IN SPECIAL PROCEEDINGS.

I. WHEN ALLOWED.

Costs and allowance, under chapter 482 of Laws 1862, relating to claims against vessels, not affected by repeal of the Code.

Chester Rolling Mills v. Vessels "Hopatcong," etc., 133 N. Y. 694.

In offer of judgment with costs "to date," the words "to date" were mere surplusage. *Lynk v. Weaver*, 128 N. Y. 171.

The court is not deprived of jurisdiction by failure to pay the costs of a motion in a former action.

Wessels v. Boettcher, 142 N. Y. 212.

An attachment in the second action may be set aside conditionally upon such failure to pay costs within a specified time. *Id.*

Where the Court of Appeals reverses the judgment of the court below and grants a new trial, "costs to abide the event" include costs to that time. *Franey v. Smith*, 126 N. Y. 658.

Costs of all parties in all courts in action for construction of will is in discretion of court.

Booth v. Baptist Church of Christ, 126 N. Y. 215.

Where plaintiff cannot recover costs in the Supreme Court in an action of trespass on lands, where recovery is at least \$50.

Lynk v. Weaver, 128 N. Y. 171.

An action of trespass on lands is one for an injury on property under section 2862, subdivision 2 of the Code. *Id.*

The provisions of section 3228 of the Code, allowing costs in an action "in which a claim of title to real property arises on the pleadings," is substantially the same as the former provision of the Revised Statutes. *Id.*

When in an action in equity, all the defendants having joined in one appeal, but one bill of costs is authorized.

Sweet v. Mowry, affirmed, 138 N. Y. 650.

The refusal of costs tendered by plaintiff on opening a default amounts to a waiver of a stay of proceedings until payment.

Kiefer v. Grand Trunk Ry. Co., appeal dismissed, 128 N. Y. 658.

Where a receiver voluntarily enters litigation, and a verdict is rendered against him, costs against him personally may be imposed on motion at Special Term after trial and before entry of judgment. *Bourdon v. Martin*, 142 N. Y. 669.

Costs—Continued.

Costs are regulated by statute, and unless so granted in the particular case a party is not entitled to them.

McKuskie v. Hendrickson, 128 N. Y. 555.

Upon the distribution of surplus moneys after foreclosure the court has power to require an unsuccessful claimant to pay the referee's fees and disbursements.

Hyman v. Hauff, affirmed, 138 N. Y. 48.

Where the payment of costs is in the discretion of the court, it is proper for the Special Term to award them in ordering final judgment.

Barnard v. Hall, 143 N. Y. 339.

II. LIABILITY FOR.

Costs cannot be awarded against an executor or administrator in the absence of the certificate required by section 1835 of the Code.

Matson v. Alley, 141 N. Y. 179.

The filing of a *lis pendens* in an action to restrain the violation of restrictive covenants of an agreement concerning the use of lands gives no priority to a judgment for costs in such action.

Crocker v. Lewis, 144 N. Y. 140.

A motion to charge the assignee of claim prosecuted by assignor with the costs was properly denied, since he did not commence the action in the name of another under section 3247 of the Code.

Thorn v. Beard, 139 N. Y. 482.

III. TAXATION AND REMEDIES.

How a defect in proof of the payment of costs imposed as a condition may be supplied.

Furman v. Furman, 173 N. Y. 309.

The right of either party to tax statutory allowance given by law for examination of witnesses by commission does not depend upon success as to the particular cause of action to which the proof was directed, but only upon such success as carried with it the right to general costs in the action.

Burns v. Delaware, Lackawanna, etc., R. R. Co., 135 N. Y. 268.

In such case, however, the party is only entitled to tax \$10 upon a single commission.

Id.

Nor, *it seems*, does the fact that the plaintiff failed to recover on the cause of action referred to defeat his right to the fees of the commissioner.

Id.

IV. EXTRA ALLOWANCE.

An action to foreclose a mortgage on real property is within the provisions of subdivision 1, section 3253 of the Code limiting an extra allowance to \$200.

Waterbury v. Tucker & Carter Cordage Co., 152 N. Y. 610.

When the Special Term had no power to grant an extra allowance

Costs—Continued.

to defendant based on the pecuniary value of the subject-matter which was alleged in the answer to be \$50,000.

Hanover Fire Ins. Co. v. Germania Fire Ins. Co., 138 N. Y. 252.

In an action brought by the attorney-general under Code Civil Procedure, sections 1948, 1949, no extra allowance is proper.

People ex rel. Winans v. Adams, 128 N. Y. 129.

Case where upon the discontinuance of an action brought by the attorney-general to forfeit the charter of a railroad company for failure to complete an extension, an allowance of \$1,500 was erroneous.

People v. Ulster & Delaware R. R. Co., 128 N. Y. 240.

The state tax upon the corporate franchise and business of a corporation furnishes no evidence of the value of the franchise upon it to base an additional allowance. *Id.*

A controversy submitted by agreement is not a case in which an extra allowance may be granted.

People v. Fitchburg R. R. Co., 133 N. Y. 239.

In an action to enjoin interference with the franchise of a corporation, where there is some testimony as to the value of such franchise it may be regarded as the basis for the award of an extra allowance.

Hudson River Telephone Co. v. Watervliet Turnpike & Ry. Co., 135 N. Y. 393.

A defendant is not relieved from the payment of a second extra allowance where a new trial is regarded as a second action.

Wing v. De la Rionda, 131 N. Y. 422.

Where in an action for damages for trespass the plaintiff made default upon trial, and the court awarded an allowance in its discretion, such discretion cannot be reviewed on appeal in the Court of Appeals.

Sentenis v. Loden, 140 N. Y. 463.

Where an order of discontinuance was entered without prejudice to a motion for extra allowance, failure to pay the allowance does not divest the Special Term of jurisdiction.

Harlem Bridge Morrisania, etc., Ry. Co. v. Town Board of Westchester, 143 N. Y. 59.

V. COSTS ON APPEAL.

Costs in the Court of Appeals are intended, where that court grants a motion to withdraw an appeal "upon payment of all costs before notice of argument."

Broadway Savings Institution v. Town of Pelham, 148 N. Y. 737.

Where neither party to an appeal from the Justice's Court made an offer of judgment, the one succeeding was entitled to costs, whether judgment was large or small, in accordance with section

Costs—Continued.

3070 of the Code as amended in 1885 and previous to the amendment of 1895. *Pierano v. Merritt*, 148 N. Y. 289.

Where the record disclosed no ground for appeal, and the question was merely how much plaintiff was entitled to recover, that under Code Civil Procedure, section 3251, upon affirmance by the Court of Appeals, ten per cent. upon the amount of the judgment should be awarded as damages for the delay.

Cohen v. Mayor, etc., of N. Y., 128 N. Y. 594.

Upon appeal from an order the General Term affirmed the order "with costs," held, under section 3251 of the Code only \$10 should have been taxed. *Cassidy v. McFarland*, 139 N. Y. 201.

VI. IN SPECIAL PROCEEDINGS.

Motion, costs and disbursements only are allowable in a proceeding for distribution of the moneys in the hands of a referee in partition. *Fowler v. Fowler*, 147 N. Y. 673.

In condemnation proceedings under a special act, costs are governed by section 3240 of the Code, not by 3372.

Matter of City of Brooklyn, 148 N. Y. 107.

In proceedings for a removal of justice of the peace, counsel fees and disbursements cannot be taxed.

Matter of King, 130 N. Y. 602.

Costs upon an inquisition of lunacy.

Carter v. Beckwith, 128 N. Y. 312.

Upon a verdict for the defendant, sued for penalties for violation of the game laws, an award of costs against the county was proper.

People v. Tanner, affirmed in 128 N. Y. 416.

Error for court has to grant an extra allowance in a proceeding instituted by a trustee for leave to resign.

Matter of Holden, 126 N. Y. 589.

It seems that there is no authority in such case to make an allowance to the new trustee. *Id.*

When has the court power to make an allowance to guardian for infants. *Id.*

Costs awarded against the plaintiff in a prosecution under the game laws are collectible against the state.

People ex rel. Fargo v. Rosendale, 142 N. Y. 670.

Counter-Claim ; See Set-Off.

In an action for the foreclosure of a mortgage, a lienor having subordinated his claim, counter-claim was properly dismissed.

Lipman v. Architectural Iron Works, 128 N. Y. 58.

Failure to pay a legacy does not entitle legatee to possession of land otherwise devised as a counter-claim.

Dinan v. Coneys, 143 N. Y. 544.

Counter-Claim—*Continued.*

Facts which controvert plaintiff's claim and serve to defeat it as a cause of action are inconsistent with the idea of counter-claim.

Walker v. American Central Ins. Co., 143 N. Y. 167.

Counter-claim may be set up where goods are inferior to that called for by the contract.

Zabriskie v. Central Vermont R. R. Co., 131 N. Y. 72.

In order to be allowed it must arise out of the same action as the claim.

Rothschild v. Whitman, 132 N. Y. 472.

Where the complaint and answer set forth independent torts, though the one induced the other, counter-claim not allowed.

Id.

The counter-claim must be connected with plaintiff's cause of action.

Id.

The debts of a firm cannot be used to offset a sum due a member thereof on a personal transaction.

Reek v. Phenix Ins. Co., 130 N. Y. 160.

County; *See Constitutional Law*; *Municipal Corporations*; *Supervisors*.

Chapter 148 of 1893, validating the illegal proceedings of the Board of Supervisors of Essex county as to changing the county seat, is unconstitutional.

Williams v. Boynton, 147 N. Y. 426.

Interest runs on the state tax payable by a county from the time when it was due.

People v. Fitch, 148 N. Y. 71.

Section 179 of the Military Code, as amended in 1896, as to the payment of wages of armors by the county, is constitutional.

Matter of Bryant v. Palmer, 152 N. Y. 412.

Maspeth Avenue in the counties of Kings and Queens is a public highway of which the Boards of Supervisors have control.

People ex rel. Keene v. Board of Supervisors of Queens Co., 151 N. Y. 190.

Chapter 428, Laws 1885, authorizing the audit by the Board of Claims of the claim of the county of Cayuga for reimbursements of expenses for the trials of certain convicts for crimes committed in state prison, is not unconstitutional.

Board of Supervisors of Cayuga Co. v. State, 153 N. Y. 279.

The claim of a county for reimbursement of the expenses of trials of convicts for crimes committed in state prison is not a private claim within the meaning of section 19, article 3 of the Constitution.

Id.

Chapter 934, Laws 1895, annexing a portion of the county of Westchester to the city and county of New York, is constitutional.

People ex rel. Henderson v. Supervisors of Westchester Co., 147 N. Y. 1.

When, under section 130 of the Highway Law, a county is bound to contribute to the expenses of a free public bridge.

People ex rel. Root v. Board of Supervisors, 146 N. Y. 107.

County—Continued.

What is a town bridge within the meaning of the statute. *Id.*

A county which maintains an insane asylum is engaged in the discharge of a public duty, and is not liable for injury to an employee. *Hughes v. County of Monroe*, 147 N. Y. 49.

Revenue received from the estates of, or from those illegally liable for the support of, lunatics in the asylum, and from the sale of surplus farm products, is not to be deemed a source of profit to the county so as to require the operation of the asylum to be treated as a private business. *Id.*

County Clerk.

Chapter 520, Laws 1893, changing the compensation of the clerk of Onondaga county from fees to a salary, although providing that it should take effect January 1, 1895, applied to the county clerk who took office on that date.

People ex rel. Onondaga County Savgs. Bk. v. Butler, 147 N. Y. 164.

County Court.

Even though the defendant does not reside in the county the County Court has jurisdiction of an action to foreclose a mechanics' lien when the property is in the county.

Raven v. Smith, 148 N. Y. 415.

Courts; *See City Courts*; *Constitutional Law*; *Court of Sessions*; *Jurisdiction*; *Justices' Courts*; *Marine Court*; *Oyer and Terminer*; *Superior Court*; *Surrogates' Courts*.

A justice of the Supreme Court assigned to duty by the Appellate Division of another department has jurisdiction if he accepts such assignment. *People v. Herrmann*, 149 N. Y. 190.

Section 232 of the Code as to the designation of Trial Term is only directory. *People v. Youngs*, 151 N. Y. 210.

An irregularity in the designation of Trial Term may be cured by re-designation. *Id.*

Power of courts is derived either from common law or statute, and whatever procedure is essential to exercise their functions is authorized.

McQuigan v. Delaware, Lackawanna, etc., R. R. Company, 129 N. Y. 50.

Chapter 601 of 1895, abolishing the office of Police Justice in New York city, is constitutional.

Koch v. Mayor, 152 N. Y. 72.

Objection to the jurisdiction of an extraordinary term of the Court of Oyer and Terminer that it was designated to be held on the same day as a regular term of such courts previously appointed is not tenable. *People v. Shea*, 147 N. Y. 78.

Courts—Continued.

The appointment of a term of court in incorrect words, but which misleads no one, will be sustained as valid.

People v. McKane, 143 N. Y. 455.

Covenants; See Deeds; Mortgages.

The rule that the covenant of a stranger to a title is personal to the covenantee, and incapable of transmission by mere conveyance of land applied.

Mygatt v. Coe, 152 N. Y. 457.

When a surrender of possession by the wife of property owned by her jointly with her husband will not make his covenants in the deed executed by both as to her title attach to and run with the land.

Id.

Damages which a grantee can recover for breach of a covenant against incumbrances considered.

McGuskin v. Milbank, 152 N. Y. 297.

What legal possession of land is sufficient to carry covenant, valid at all events against all extraneous intrusion, and capable of transfer and devolution.

Mygatt v. Coe, 147 N. Y. 456.

Though a covenant runs to the grantee, "his heirs and assigns" it does not dispense with the necessity of privity of estate in order to carry the covenant with the land, and these words will not make a covenant which in its nature or otherwise is personal, run with the land.

Id.

There must be a surrender by a wife to her husband of some interest or dominion over her real property, by some act or agreement on her part expressed or implied, which will take from her at least some right or incident ordinarily pertaining to the absolute ownership of real estate in order to give him any legal possession of her premises on which they lived.

Id.

Her husband may be asked whether or not he received any part of the consideration paid for and expressed in the deed of his wife.

Id.

The force and effect of a formal and complete covenant of warranty will not be cut down by subsequent words of doubtful import.

Cornish v. Capron, 136 N. Y. 232.

Covenants of warranty and quiet enjoyment are broken by the foreclosure of a paramount mortgage and a sale thereunder to a purchaser who took possession.

Id.

A covenant of quiet enjoyment in a warranty deed is broken by the foreclosure of a paramount mortgage and eviction thereunder.

Jenks v. Quinn, 137 N. Y. 223.

The fact that the plaintiff, without actual knowledge of the covenant, offered no objection to the sale, does not prevent him from recovering.

Id.

A mere quit-claim deed is sufficient to transfer to the grantee the benefit of a covenant for quiet possession which grantor enjoyed.

Id.

Covenants—Continued.

Where the deed of one in mere possession contains a covenant that the wife was seized of the property conveyed, said covenant runs with the land, and the husband is liable to one who had acquired title through foreclosure.

Mygatt v. Coe, 142 N. Y. 78.

In such a case the mortgagor retains the legal estate, and the mortgagee has a lien upon it for security. *Id.*

The covenants run to mortgagee and grantee of mortgagor in proportion to their respective rights, and are divisible accordingly. *Id.*

One in mere possession of land has an estate which may be conveyed. *Id.*

Equitable assets can only be reached after the remedy at law has been exhausted. *Harvey v. Brisbin*, 143 N. Y. 151.

Where no public highway exists, the opening of one constitutes breach of quiet enjoyment. *Hymes v. Esty*, 133 N. Y. 342.

In order to sustain an action for breach a defective title must be shown. *Wilson v. Parshall*, 129 N. Y. 223.

A wrongful assertion, not true in fact, will not sustain an action for breach. *Id.*

The covenant of a landlord to repair does not inure to the benefit of a stranger sustaining injury because of its breach.

Sterger v. Van Sicklen, 132 N. Y. 499.

An agreement by adjoining lot owners that a space of eight feet on the front of the lots should be kept free from building was a conveyance of real estate within the Revised Statutes, and required the prescribed acknowledgment of married woman.

Bradley v. Walker, 138 N. Y. 291.

The record was not notice to a grantee of such married woman of the existence of such agreement. *Id.*

What does not constitute such notice. *Id.*

What covenants running with the land gave plaintiff, who became owner and resident upon one of the lots, conveyed subject to the agreement, right to an injunction restraining the use of defendant's premises for the purpose of dissecting.

Rowland v. Miller, 139 N. Y. 93.

A covenant by the grantee in a deed to pay all incumbrances on the premises by mortgage or otherwise, which deed reserves from its operation the dower interest of the wife of the grantor, will not sustain an action by such wife against the grantee for breach of the covenant by which she lost her dower right.

Durnherr v. Rau, 135 N. Y. 219.

Creditor ; *See Debtor and Creditor.*

Creditor's Suit ; *See Execution and Supplementary Proceedings ; Fraudulent Conveyance.*

An action is compulsorily referable brought by a general creditor

Creditor's Suit—Continued.

of a deceased insolvent debtor under chapter 740 of 1894 to set aside alleged conveyance.

National Shoe & Leather Bk. v. Baker, 148 N. Y. 581.

The commencement of an action in the nature of a creditor's bill does not create a lien upon his tangible personal property, subject to a levy by an execution, unless he procures a receiver to be appointed.

Kitchen v. Lowery, 127 N. Y. 53.

A creditor's action to set aside a general assignment cannot proceed after the death of assignor, unless his personal representative is made a party.

First Nat. Bk. of Amsterdam v. Schuler, 153 N. Y. 163.

When a creditor's action does not lie to set aside an assignment for benefit of creditors, because of greater preference than the statute allows.

Central Nat. Bank v. Selegman, 138 N. Y. 435.

It seems, that to sustain such an action to set aside a transfer or security given immediately before the assignment, the burden is on the plaintiff.

Id.

The fact that the amount of a preference in a general assignment was arrived at by computing compound interest upon the claim, and that the assignee paid over the full amount to the preferred creditor before the preference was adjudged invalid, will not entitle a creditor to recover the entire amount paid under the preference.

Peyser v. Myers, 135 N. Y. 599.

A general creditor cannot maintain an action to avoid judgments obtained against his debtor.

Frothingham v. Hodenpyl, 135 N. Y. 630.

An action by a judgment creditor, in his own behalf, to set aside a conveyance of the debtor as made in fraud of creditors, can be maintained only upon showing the issue and return of an execution unsatisfied in whole or in part.

Prentiss v. Bowden, 145 N. Y. 342.

An execution issued on the day of, but after the death of the judgment debtor, without notice to his legal representatives or permission of the surrogate, is absolutely void.

Id.

Though it has no legal title as attaching creditor, plaintiff may maintain action as the real party interested.

National Park Bank v. Goddard, 131 N. Y. 494.

Equity has jurisdiction to prevent multiplicity of suit.

Id.

Officers by whom replevin was made should be made parties.

Id.

A simple contract creditor cannot attack the transfer of property by his debtor until after return of execution unsatisfied.

Spelman v. Freedman, 130 N. Y. 421.

General creditors may maintain an action to set aside fraudulent confession of judgments.

Id.

Whatever is done with intent to defeat the statute is within the prohibition thereof.

Id.

Creditor's Suit—Continued.

A general creditor cannot maintain an action to set aside a fraudulent conveyance by his debtor.

Briggs v. Austin, 129 N. Y. 208.

Creditor's rights against the estates of deceased persons attach to the land as a lien immediately upon the death of the owner.

Rosseau v. Bleau, 131 N. Y. 174.

An action cannot be maintained to set aside a conveyance, though the deed is not delivered until after the grantor's death. *Id.*

Statute confers no power upon an administrator to set aside a conveyance made by his intestate, though the deed is not delivered until after intestate's death. *Id.*

Alimony awarded to an innocent wife cannot be appropriated to discharge a debt contracted before decree of divorce.

Romaine v. Chauncey, 129 N. Y. 566.

A court of equity will refuse its aid where granting it would work injustice. *Id.*

Criminal Law; *See* *Disorderly Person*; *Extortion*; *Extradition*; *False Pretense*; *Felony*; *Forgery*; *Homicide*; *Indictment*; *Larceny*; *Malicious Mischief*; *Perjury*; *Police Court*; *Rape*; *Recognizance*; *Seduction*; *Sentence*; *Unlawful Assembly*.

I. JURISDICTION.

II. OFFENSES.

III. EVIDENCE.

IV. INDICTMENT.

V. DEFENSES.

VI. ARREST.

VII. PRACTICE IN REVIEW.

I. JURISDICTION.

The County Court of a county in which false representations are made has jurisdiction of offense, which was committed partly in another county.

People v. Peckens, 153 N. Y. 576.

Section 6, article 6 of the Constitution is self-executing, and no order was necessary to transfer proceedings from the Court of Oyer and Terminer to the Supreme Court.

People v. Hoch, 150 N. Y. 291.

It is the duty of the court, where it deems the evidence insufficient to warrant a conviction, to advise the jury to acquit, and the jury must obey the advice. *People v. Ledwon*, 153 N. Y. 10.

The denial of a request to dismiss an indictment when evidence will not warrant a conviction, presents a question of law. *Id.*

The summoning of trial jurors by mail is not prejudicial to defendant when all jurors qualified to sit appear.

People v. Burgess, 153 N. Y. 561.

Criminal Law—Continued.

Objection to the jurisdiction of an extraordinary term of the Court of Oyer and Terminer that it was designated to be held on the same day as a regular term of such court previously appointed, is not tenable. *People v. Shea*, 147 N. Y. 78.

Where the verdict of conviction in a criminal case is set aside, owing to the relationship of a member of the court, such verdict is no bar to second trial for the same offense.

People v. Connor, 142 N. Y. 130.

II. OFFENSES.

A person may be convicted of the crime of attempting to extort money, although the person threatened was decoy for the police at the time. *People v. Gardner*, 144 N. Y. 119.

When mental weakness does not ordinarily excuse from consequences of crime. *People v. Burgess*, 153 N. Y. 561.

One who procures by counsel the commission of a crime is responsible therefor. *People v. Peckens*, 153 N. Y. 576.

When the setting fire to his own room by the defendant for the purpose of destroying insured property therein, constitutes arson in the first degree. *People v. Fanshawe*, 137 N. Y. 68.

Section 504 of the charter of Buffalo, requiring contracts with the city to bind the contractor not to discriminate against members of labor organizations, etc., is simply directory.

Warren v. Beck, 144 N. Y. 225.

The crime of abortion is not made out merely by proof of advice to take medicine for the purpose.

People v. Phelps, 133 N. Y. 267.

The offense of attempting to commit a crime depends upon the mind and intent of the wrongdoer.

People v. Gardner, 144 N. Y. 119.

The age of consent fixed by the statute defining rape does not apply to the crime of seduction, but the consent essential to that crime may be given by a female of any age.

People v. Nelson, 153 N. Y. 90.

The term "chaste character," as used in the statute relating to seduction under promise of marriage, does not mean reputation for chastity, but actual personal virtue. *Id.*

Conducting a horse-race pursuant to chapter 570 of 1895 is not a crime within section 352 of the Penal Code.

People ex rel. Lawrence v. Fallon, 152 N. Y. 12.

Section 153 of the Public Health Law as amended in 1895, construed.

People v. Hawker, 152 N. Y. 234.

III. EVIDENCE.

What is competent on the question of intent and deliberation.

People v. Shea, 147 N. Y. 78.

Criminal Law—*Continued.*

Evidence insufficient to sustain a defense of irresponsibility on account of epilepsy. *People v. Burgess*, 153 N. Y. 561.

One who is not an expert may testify that a substance is blood. *Id.*

Declarations of a confederate are admissible against the others. *People v. Peckens*, 153 N. Y. 576.

Evidence of similar transactions tending to show the existence of a scheme to defraud by similar devices to those practiced on complainant is admissible to show intent. *Id.*

When acts and declarations of each conspirator are binding on the others. *Id.*

What evidence may be given to prove conspiracy. *Id.*

What is sufficient evidence to corroborate a confession of homicide. *People v. Hoch*, 150 N. Y. 291.

In a capital case question of motive is unimportant where other evidence points to defendant's guilt.

People v. Feigenbaum, 148 N. Y. 636.

What it is essential that the tribunal before which the evidence is adduced shall be legally constituted, it is not essential that the connecting evidence shall be competent in every particular.

People v. Spiegel, 143 N. Y. 107.

What facts are not sufficient to sustain a conviction for selling liquor on Sunday. *People v. Owens*, 148 N. Y. 648.

In a capital case what is held sufficient to corroborate testimony of accomplice. *People v. Mayhew*, 150 N. Y. 346.

Evidence of the relation of the parties may be given to determine whether the act was committed in a fit of passion or that of deliberation. *People v. Barber*, 149 N. Y. 256.

What evidence of defendant's relations with other women cannot be shown on the trial of an indictment for murder of defendant's second wife. *People v. Strait*, 148 N. Y. 566.

Checks found on the person of a defendant, unless they are shown to be forgeries, are not admissible on the trial of an indictment for passing a forged check. *People v. Altman*, 147 N. Y. 473.

Suspicious acts of defendant may be shown on the trial of indictment for receiving stolen goods.

People v. Schooley, 149 N. Y. 99.

What evidence may be given as bearing on the question of identity on the trial of indictment for receiving stolen goods. *Id.*

What evidence may be given on the trial of an indictment for receiving stolen goods. *People v. McClure*, 148 N. Y. 95.

The existence of motive is of little or no importance in a case where there is no proof of commission of a crime.

People v. Ledwon, 153 N. Y. 10.

What weight may be given testimony of a witness who is irresponsible either from mental or moral defects. *Id.*

When a will made by the wife, prior to the marriage, giving her

Criminal Law—*Continued.*

- property to her husband, if any, and if she died unmarried to defendant, is admissible on the question of motive. *People v. Buchanan*, 145 N. Y. 1.
- A deed made by the wife to defendant after marriage, and his conveyance of the property, are admissible. *Id.*
- Declarations of defendant showing hostile feelings toward his wife are relevant on the question of motive. *Id.*
- When a refusal to strike out all evidence on one count is proper. *Id.*
- Facts competent on the question of premeditation and deliberation. *People v. Scott*, 153 N. Y. 40.
- What may be proof on a trial for murder in the first degree to establish motive. *Id.*
- What evidence is sufficient to sustain a conviction of murder in the first degree. *People v. Young*, 151 N. Y. 210.
- Facts sufficient to sustain a conviction of murder in the first degree. *People v. Hampton*, 144 N. Y. 639.
- Evidence sufficient to sustain a conviction of murder in the first degree. *People v. Wilson*, 145 N. Y. 628.
- Proof that party of words, "There go the burglars," is admissible as bearing upon the opportunity the suspected men had to enter into an agreement to resist arrest. *People v. Wilson*, 145 N. Y. 628.
- Evidence that the suspected persons were brothers is also admissible as bearing on the issue of agreement between them to effect escape together of action. *Id.*

IV. INDICTMENT.

- An indictment may, notwithstanding section 29 of the Penal Code, state facts. *People v. Peckens*, 153 N. Y. 576.
- An indictment for false pretenses is sufficient if it states and negatives one false pretense. *Id.*
- An indictment for obtaining a deed by false pretenses which gives a description of the premises and states the consideration, the names of the grantor and grantee and the value of the deed, sets out the deed sufficiently. *Id.*
- A statement that the land was of a certain value is a sufficient allegation of the value of the deed. *Id.*
- When court has power to refuse to strike out previous counts in an indictment and retain them for reference. *People v. McLaughlin*, 150 N. Y. 365.
- What is sufficient information that the burglary was committed. *Swart v. Rickard*, 148 N. Y. 264.
- Indictment not demurrable on ground that it charged two crimes, viz.: forging a check and intent to defraud a person by offering such forged check. *People v. Altman*, 147 N. Y. 473.
- Identity in names of offenses at common law and under a statute

Criminal Law—Continued.

does not necessarily imply that the same precise constituents, and no other, enter into each. *People v. Most*, 128 N. Y. 108.
What is a good sufficient indictment for perjury.

People v. Williams, 149 N. Y. 1.
Allegations in a common-law action in indictment for murder, *held* sufficient to sustain a conviction for murder in the first degree. *People v. Constantino*, 153 N. Y. 24.

Within what time an indictment for seduction may be filed.

People v. Nelson, 153 N. Y. 90.
Minutes of the grand jury are not common-law evidence as to what a witness testified to before them.

People v. Conroy, 153 N. Y. 174.
Extent of cross-examination of defendant who offers himself as a witness in a criminal action, considered. *Id.*

When separate counts for burglary, larceny and receiving stolen goods be joined in same indictment.

People v. Wilson, 151 N. Y. 403.
What is not sufficient to exclude inference that a person had possession of stolen property. *Id.*

An indictment will not be dismissed on the sole ground that a circular of a committee of public safety, advising grand jurors as to their duties, was circulated among them.

People v. Shea, 147 N. Y. 78.

V. DEFENSES.

Killing committed in passion excited by previous treatment of the person killed does not constitute murder in the first degree.

People v. Barberi, 149 N. Y. 256.
There may be deliberation and premeditation even where the act of homicide is committed in a fit of passion.

People v. Tuzckewitz, 149 N. Y. 240.
What testimony does not discredit evidence of an accomplice.

People v. Mayhew, 150 N. Y. 346.
Right of self-defense discussed.

People v. Constantino, 153 N. Y. 24.
Partial or incipient insanity is not a sufficient excuse from criminal liability under Penal Code, section 21.

People v. Taylor, 138 N. Y. 398.
An insane delusion that the deceased, a fellow-prisoner, was acting as a spy upon the defendant who had devised a way of escape from prison, *held*, not sufficient ground for relieving him from responsibility. *Id.*

VI. PRACTICE.

Where the prosecution, on trial for an attempt to extort money, has given evidence of prior intimacy between the defendant and complainant, it is error to exclude evidence to show that in his

Criminal Law—*Continued.*

relation with the complainant the defendant was acting under the direction of the Society for the Prevention of Crime.

People v. Gardner, 144 N. Y. 119.

Where no violation of statute is shown the accused cannot be held.

People v. Van Zile, 143 N. Y. 368.

A general verdict will be set aside where a prior specific charge was erroneous. *Id.*

It is error for the court not to submit the question of criminal intent to the jury on the trial of an indictment for forgery in the second degree. *People v. Wilman*, 148 N. Y. 29.

A postponement of a trial for murder is properly denied where it is not asked on the ground of absence of witnesses.

People v. Shea, 147 N. Y. 78.

Whether the killing was deliberate or premeditated is always a question for the jury in the light of the facts.

People v. Conroy, 153 N. Y. 174.

When stenographer's minutes in a capital case may be changed. *Id.*

Compelling a defendant in a criminal case to stand up for identification by a witness is not a violation of the constitutional provision protecting him from being compelled to be a witness against himself. *People v. Gardner*, 144 N. Y. 119.

Premises where the homicide took place may be shown by photographs. *People v. Pustolka*, 149 N. Y. 570.

What questions are not leading in a prosecution for wife murder. *People v. Nino*, 149 N. Y. 317.

Evidence of the mental condition of defendant in a prosecution for murder at the time of the trial is admissible when.

People v. Hoch, 150 N. Y. 291.

What charge on the subject of a "reasonable doubt" is proper.

People v. Barker, 153 N. Y. 111.

Where a witness has previously testified in a murder trial that defendant was sick at the time it was claimed he committed the fatal act, it is not proper to allow the question as to the particular character of the sickness when the result is to elicit testimony tending to prejudice the jury against the defendant.

People v. Corey, 148 N. Y. 476.

A charge to the jury on a murder trial as to defendant's intoxication is erroneous when it fails to state the rule laid down in section 22 of the Penal Code with sufficient clearness that partial intoxication may be considered on the question of intent in determining the degree of the crime. *Id.*

When a refusal to appoint an interpreter for defendant is not prejudicial error. *People v. Constantino*, 153 N. Y. 24.

It is not error for the court, when charging on the question of deliberation and premeditation, to illustrate a minute of time by his watch. *Id.*

Criminal Law—Continued.

It is prejudicial error for the court to erroneously state to an insanity expert that there had been no testimony of a physician as to delusions.

People v. Nino, 149 N. Y. 317.

What is error for court to charge on the issue of insanity. *Id.*

An expert based his opinion as to insanity on certain interviews, and therefore it was proper to show the conversations which were had. *Id.*

What does not constitute a separation of a jury within section 465 of the Code of Criminal Procedure.

People v. Hoch, 150 N. Y. 291.

The magistrate of special sessions should keep minutes of testimony, that their determination may be reviewed on appeal.

People v. Giles, 152 N. Y. 136.

On an appeal under section 749 of the Code of Civil Procedure from the commitment of children pursuant to section 291 of the Penal Code, when the evidence upon which the appeal is allowed does not allege any errors with reference to a determination of the facts, the evidence is not required to be returned, and the failure of the magistrate to preserve it furnishes no ground for reversal. *Id.*

The Court of Appeals has power to require literal copies of stenographer's minutes in such a case. *Id.*

Purely statutory offenses cannot be established by implication.

People v. Phyfe, 136 N. Y. 554.

A charge that the heat of passion and feeling produced by motives of anger, hatred or revenge is not insanity, etc., is not erroneous.

People v. Foy, 138 N. Y. 664.

At reply to defendant's counsel by court that, "If the facts are against the defendant, that is not my fault; it is unfortunate, but I cannot help it," unobjectionable.

People v. Leach, 146 N. Y. 392.

A conviction for seduction under promise of marriage under section 284 of the Penal Code, cannot be based on a conditional promise to marry.

People v. Van Alstyne, 144 N. Y. 361.

When it is proper to cross-examine a witness as to facts of a previous examination of defendant on previous trial for murder.

People v. Hoch, 150 N. Y. 291.

A reprieve by the governor to a day certain, in a capital case, authorizes the execution of sentence on that day.

People v. Buchanan, 146 N. Y. 264.

Where, however, the time fixed by the reprieve has passed, defendant should be brought before the court for sentence. *Id.*

VII. PRACTICE IN REVIEW.

When the Court of Appeals will not disturb a verdict of murder in the first degree.

People v. Conroy, 153 N. Y. 174.

When it is apparent that no harm resulted to defendant or admis-

Criminal Law—Continued.

- sion of incompetency, evidence is not ground for reversal in a capital case. *People v. Burgess*, 153 N. Y. 561.
- Power of Court of Appeals to order new trial in capital case in the absence of exception. *People v. Hoch*, 150 N. Y. 291.
- The verdict of the jury in a capital case on the question of insanity will be regarded as conclusive by the Court of Appeals, unless clearly against the weight of evidence. *Id.*
- When a record shows that defendant has been found guilty of receiving stolen goods. *People v. McClure*, 148 N. Y. 95.
- A statement by witness to jury viewing premises in the absence of defendant is a ground for a new trial. *People v. Gallo*, 149 N. Y. 106.
- Cases where Appellate Division set aside a trial and conviction on the ground that a fair and impartial trial could not be had in the county. *People v. McLaughlin*, 150 N. Y. 365.
- Even where no exception was taken the Court of Appeals may review erroneous statements of law or improper comments on the facts. *People v. Barberi*, 149 N. Y. 256.
- Any valid exception taken by defendant in a capital case must be regarded by the Court of Appeals. *People v. Corey*, 148 N. Y. 476.
- The fact that jury in charge of officers attended church is not ground for reversal. *People v. Constantino*, 153 N. Y. 24.
- When the power of the Court of Appeals to order a new trial in capital cases is to be exercised. *Id.*
- When an appeal will not lie to the Court of Appeals from an order denying a motion for a new trial in a capital case on the ground of newly-discovered evidence. *People v. Mayhew*, 151 N. Y. 543.
- A disallowance of a demurrer to an indictment may be reviewed on an appeal from the judgment of conviction, even though the objection was not renewed on the trial. *People v. Wilson*, 151 N. Y. 403.
- When the Court of Appeals will not grant a new trial in a capital case for errors in ruling. *People v. Youngs*, 151 N. Y. 210.
- A conviction of murder in the first degree will not be reversed by the Court of Appeals where the finding is not clearly against the weight of evidence. *People v. Shea*, 147 N. Y. 78.
- A new trial will not be granted in a criminal case merely because the names of some of the witnesses examined before the grand jury were not indorsed on the indictment, especially where defendant was not prejudiced by such omission. *Id.*
- Whether or not a new trial shall be granted in a criminal case on the ground of a separation of the jurors after the case was submitted to them, is in the discretion of the trial court. *People v. Buchanan*, 146 N. Y. 264.

Cross-Examination; *See Witness.*

Curtesy; *See Husband and Wife.*

The right of a tenant by the curtesy is a legal right to be enforced against the claimant in possession.

Harvey v. Brisbin, 143 N. Y. 151.

A tenant by the curtesy in lands is entitled to the use of the fund during his lifetime. *Matter of Camp*, 126 N. Y. 377.

In such case, the right of the ward, on attaining majority, is not entitled to demand immediate possession of the fund. *Id.*

Custom and Usage; *See Contracts.*

D.

Damages; *See Assault and Battery; Breach of Promise to Marry; Contracts; Covenants; Libel and Slander; Municipal Corporations; Negligence; Sales; Tort; Vendor and Purchaser.*

I. LIABILITY FOR.

II. AGGRAVATION AND MITIGATION.

III. MEASURE OF DAMAGES.

1. Generally.

2. For Breach of Contract.

3. For Wrongs.

I. LIABILITY FOR; *See Titles of Actions.*

Recovery may be had for the diminution of rental value.

Mortimer v. Manhattan Elev. R. R. Co., 129 N. Y. 81.

Distinction between damages to fee and for wrong-doing is recognized. *Mitchell v. Met. Elev. R. R. Co.*, 132 N. Y. 552.

Only damages actually incurred can be recovered.

Rumsey v. N. Y. & New England R. R. Co., 133 N. Y. 79.

Damages as a condition of avoiding an injunction are only such as would be given in condemnation proceedings.

Bohm v. Met. Elevated Ry. Co., 129 N. Y. 576.

Rule of damages in such case considered. *Id.*

If the erection of railroad has not caused a decrease, or prevented an increase, no damages are shown. *Id.*

The effect of the erection of the railroad upon other property has no effect upon question of damages. *Id.*

Right of abutting owner to recover damages for injury to the fee is reaffirmed. *Hughes v. Met. Elev. R. R. Co.*, 130 N. Y. 14.

Equitable principles are not available in an action for damages merely.

Rumsey v. N. Y. & New England R. R. Co., 133 N. Y. 79.

The price specified in a contract of sale is sufficient to justify a

Damages—Continued.

jury in finding that sum as damages, in a suit for the conversion of the property.

Herald v. Van Siclen, affirmed without opinion, 128 N. Y. 612.

The owner of premises formerly used as a brickyard is entitled to recover against a railroad, which, without authority, has cut off communication with an adjoining river, the fair rental value of the property if such obstruction did not exist.

Rumsey v. N. Y. & New England R. R. Co., 136 N. Y. 543.

An obligation to pay in specific articles becomes one for the payment of money on the refusal to deliver the articles.

New York News Publishing Company v. National Steamship Co., 148 N. Y. 39.

Damages for personal injuries are in nature of compensation for pecuniary loss.

Barnes v. Keene, 132 N. Y. 13.

Where plaintiff proved the value of his services, evidence tending to present an erroneous measure of damages is inadmissible. *Id.*

The pecuniary condition of plaintiff has no bearing on question of damages. *Id.*

Consequential damages for loss of wife's services can only be recovered by the husband.

Bloehenska v. Howard Mission & Home for Little Wanderers, 130 N. Y. 497.

A party to a fraudulent contract is liable for nominal, if not actual, damages.

Pryer v. Foster, 130 N. Y. 171.

In an action at law for breach of contract, damages as for specific performance cannot be allowed.

Matthews v. Matthews, 133 N. Y. 679.

A person is entitled to recover for actual expenses, but not for uncertain prospective profits.

Bernstein v. Meech, 130 N. Y. 354.

Upon the violation of a covenant running with the land, damages might be given as for a permanent injury.

Amerman v. Deane, 132 N. Y. 355.

A party is entitled to recover the amount agreed upon, for services rendered.

Porter v. Dunn, 131 N. Y. 314.

Expenditures are not included in amount agreed upon for services.

Id.

Plaintiff can only recover nominal damages where no loss has been sustained.

Barnes v. Brown, 130 N. Y. 372.

A pledgee of promissory notes, who surrenders them without consideration to the maker, who is insolvent, becomes liable to the pledger for their conversion.

Griggs v. Day, 136 N. Y. 152.

If the property is leased for a special purpose, which is known to the lessor, and possession is refused because of a prior lease to another lessee or of other fault of the lessor, the lessee may recover his actual and necessary expenses.

Friedland v. Myers, 139 N. Y. 432.

Damages—Continued.

Where the lessee, who could not gain possession, was a druggist, and he was obliged to sell counters and fixtures at public auction, he was entitled to recover for his loss thereon. *Id.*

A contract for building a railroad, provided that defendant had a right to dissolve it at any time on five days' notice, and plaintiff agreed not to make any claim for delay, and defendant suspended the work, but requested plaintiff to keep his force ready to resume it when required, contractor was only entitled to recover for the work done, and the expense of retaining his men.

Curnan v. Delaware & Otsego R. R. Co., 138 N. Y. 480.

One whose stock was unlawfully pledged by another may recover the highest amount for which it sold within a reasonable time after such conversion, less the unsatisfied portion of the debt for which it was pledged. *Smith v. Savin*, 141 N. Y. 315.

A verdict for plaintiff awarding damages for injuries resulting in depriving the plaintiff of prospective offspring is erroneous.

Butler v. Manhattan Ry. Co., 143 N. Y. 417.

A sub-lessor is liable for breach of covenant to the extent of the amount paid by his lessee.

Matter of Strasburger, 132 N. Y. 128.

But where the breach occurred through the lessor's misfortune, insanity, the strict rule of damages does not apply. *Id.*

Where no loss is sustained by breach, nominal damages may be given. *Id.*

Where a sub-lessor becomes insane, payment to the superior landlord will protect sub-lessee. *Id.*

Proceedings for assessment of damages is not like trial of an action.

Bossout v. Rome, Watertown, etc., R. R. Co., 131 N. Y. 37.

Where the judgment of the court below is sustained the inquisition is similar to an ordinary inquest. *Id.*

A motion to set aside an inquisition is largely in the discretion of the court. *Id.*

Under the old practice, if injustice had been done, the court would set aside the inquisition. *Id.*

The amendment of the Constitution prohibiting any limit of recovery in actions for injuries resulting in death, is not retrospective. *Isola v. Weber*, 147 N. Y. 329.

Presumptive profits may be recovered by a tenant who has been evicted and whose business is injured by the wrong of his landlord. *Snow v. Pulitzer*, 142 N. Y. 263.

Where loss in the rental occurs through lessee's breach of covenant, the amount of damages is a question for the jury.

U. S. Trust Co. v. O'Brien, 143 N. Y. 284.

Neither party can recover in common law actions for maritime torts where both vessels are at fault.

New York Harbor Towboat Co. v. N. Y., L. E. & W. R. R. Co., 148 N. Y. 574.

Damages—Continued.**II. AGGRAVATION AND MITIGATION.**

Jury may award punitive as well as damages for loss of service for willful seduction. *Lawyer v. Fritcher*, 130 N. Y. 239.

Punitive damages may be awarded for unprovoked assault.

Connors v. Walsh, 131 N. Y. 590.

In an action for libel the jury may award punitive damages when motive is proven. *Holmes v. Jones*, 147 N. Y. 59.

Proof of falsity of a libelous publication is evidence of malice for which exemplary damages may be awarded.

Warner v. Press Publishing Co., 132 N. Y. 181.

A libel recklessly or carelessly published will support an award of punitive damages. *Id.*

III. MEASURE OF DAMAGES.**1. Generally.**

The apportionment of damages, when sustained by evidence, will be sustained. *Messenger v. Manhattan Ry. Co.*, 129 N. Y. 502.

The effect of the erection of a railroad may be considered as bearing upon the rental, but not upon the fee value. *Id.*

The element of noise of trains can be considered in abutter's action.

American Bank Note Co. v. N. Y. Elevated R. R. Co., 129 N. Y. 252.

But noise cannot be considered in fixing the sum which defendant must pay for fee damage to prevent the issuing of an injunction. *Id.*

Where the benefits to land taken equal or exceed the injuries, no award can be made.

Odell v. N. Y. Elevated R. R. Co., 130 N. Y. 690.

A refusal to find as a fact in action for fee damage that the value of the assessments taken, considered alone, was merely nominal, *held*, while erroneous, not to be sufficient ground for reversal, where the correct rule in ascertaining the damages was followed.

Sixth Ave. R. R. Co. v. Metropolitan El. R. Co., 138 N. Y. 548.

The refusal of the court to state as a conclusion of law that in order to recover beyond a nominal sum for the taking of easements plaintiff must establish by a preponderance of proof that he has suffered consequential damages, in such case, is not reversible error. *Id.*

Where the damages awarded were for injury to the easements of air, light and access only, a refusal to exclude evidence of noise and vibration was harmless. *Id.*

A refusal by the referee to find that the easements, aside from any damage to the lot, have in themselves a nominal value only, *held*, error.

Livingston v. Metropolitan El. Ry. Co., 138 N. Y. 76.

Damages—Continued.

A refusal to find as matter of law that the special benefits resulting from the road should be offset against any consequential damages to the lot from the appropriation of the easements, *held*, error. *Id.*

Where one building occupies two lots, the damages cannot be limited to the lot affected by the erection of a railroad.

Stevens v. N. Y. Elevated R. R. Co., 130 N. Y. 95.

The measure of damages upon the unauthorized purchase of stock by a broker to close an account for future delivery is the difference between the amount paid and what the stock might have been bought for subsequently if ordered by the purchaser.

Rogers v. Wiley, 131 N. Y. 527.

In an action by an abutting owner against an elevated railroad the element of noise may be considered in ascertaining past damages.

Bischoff v. N. Y. El. R. R. Co., 138 N. Y. 257.

Benefits accruing from the road are to be considered in reduction of damages for the injuries sustained. *Id.*

In fixing the sum to be paid by an elevated railroad in avoidance of an injunction in an abutter's action, the damages are not to be limited to those caused by the structure only, but the operation of the road is to be deemed an element of damage.

Sperb v. Metropolitan El. Ry. Co., 137 N. Y. 155.

A refusal to find that the easements, aside from consequential damages, were only of nominal value, and that the benefits to the abutting property should be offset, is error. *Id.*

The principle which should guide an award of damages to be paid by the railroad company in order to obviate the injunction is the same as in proceedings under the statute to condemn property for the railroad use. *Id.*

What sums may be recovered in an action by stockholders against directors of a corporation for losses caused by their negligence.

Bloom v. National United Benefit Savings & Loan Co., 152 N. Y. 114.

Measure of damages in case of injury to building by leakage of water from canals, considered. *Slavin v. State*, 152 N. Y. 45.

In computing the sum to be paid by defendant for plaintiff's property rights in the street, plaintiff is not entitled to recover anything except damage to his land.

Steubing v. N. Y. El. R. R. Co., 138 N. Y. 658.

The principles laid down in *Drucker v. Metropolitan Ry. Co.*, 106 N. Y. 157, applied.

Sherwood v. Metropolitan Elevated R. R. Co., affirmed without opinion in 128 N. Y. 624.

A purchaser of property is entitled to cover the actual damages sustained during his ownership because of past diminution of rental values. *Id.*

Damages—Continued.

All benefits to the property, from the railroad, are to be considered, and damages over such benefits are recoverable.

Sutro v. Manhattan Ry. Co., 137 N. Y. 592.

A refusal to find that the easements taken were only of nominal value is error. *Id.*

To same effect, *Saxton v. N. Y. El. R. R. Co.*, 139 N. Y. 320.

It is proper to submit to the jury whether the obstruction of the street diminished the rental value of houses.

Williams v. Brooklyn Elevated R. R. Co., 126 N. Y. 96.

It is proper to permit the jury to award damages for loss sustained through inability of plaintiff to rent the houses from time to time. *Id.*

Damages for diverting water from defendant's pond considered.

Spencer v. Kilmer, 151 N. Y. 390.

The jury have the right to award interest upon unliquidated damages. *Moore v. N. Y. Elevated R. R. Co.*, 126 N. Y. 671.

2. For Breach of Contract.

Measure of damages for breach of covenant is the diminution in value of the property granted.

Hymes v. Estey, 133 N. Y. 342.

Whether the cases allowing the purchase price or a part of it as damages should be allowed,—*quære?* *Id.*

Damages which a grantee can recover for breach of a covenant against incumbrances considered.

McGuckin v. Milbank, 152 N. Y. 297.

Where defendant agreed to let portion of his store to plaintiff, damages for breach of such arrangement may be based upon the value of the agreement to plaintiff when breach occurred.

Dickinson v. Hart, 142 N. Y. 183.

Proof of gross amount of sales, of net profits and of income during continuance of agreement will furnish a basis to ascertain value of agreement. *Id.*

Measure of damages for breach to repair, under lease reserving to the landlord a right of re-entry to make repairs, and providing that in such case the rent shall be suspended "in similar manner and proportion," as in case of fire, considered.

Thomson-Houston Electric Co. v. Durant Land Imp. Co., 144 N. Y. 34.

Measure of damage where city fails to put lessee of wharfage rights in possession. *Eastman v. Mayor*, 152 N. Y. 468.

Measure of damages against a city preventing the lessee from acquiring possession by keeping a barge moored in front of the wharf. *Id.*

Where a contract for board and lodging provides "no deduction in case of absence," the measure of damage is the contract price. *Wilkinson v. Davies*, 146 N. Y. 25.

Damages—Continued.

Measure of damages for breach of contract of sale of perishable articles. *Todd v. Gamble*, 148 N. Y. 382.

A contract for the sale of ice provided for its shipment, and the shrinkage during transit falls upon the buyer.

Clark v. Stewart, 127 N. Y. 676.

Measure of damages for the violation by plaintiffs of an agreement not to manufacture certain machines is the amount of the profit and does not include royalties.

Blake v. Krom, 128 N. Y. 64.

3. For Wrongs.

Measure of damages in an action for a wrongful discharge.

Watson v. Russell, 149 N. Y. 388.

What libel will support an award of punitive damages.

Smith v. Matthews, 152 N. Y. 152.

A verdict for \$8,000 for injuries resulting in curvature of spine is not excessive. *Bennett v. N. Y. C. R. R. Co.*, 133 N. Y. 563.

A verdict for \$8,000 for serious and permanent injuries is not excessive.

Alexander v. Rochester City and Brighton R. R. Co., 128 N. Y. 13.

Verdict of \$14,000 for permanent injuries and disfigurement sustained. *Wallace v. Vacuum Oil Co.*, affirmed, 128 N. Y. 579.

Plaintiff is entitled to recover not only for loss of services up to time of trial, but for prospective loss and for actual expenses necessarily incurred.

Dollard v. Roberts, 130 N. Y. 269.

In an action to recover damages to property by reason of negligence on the part of the defendant, it is within the power of the jury to include in their award of damages interest on the sum found.

Wilson v. City of Troy, 135 N. Y. 96.

In action for personal injuries, plaintiff can recover for future pain as well as past.

Kane v. N. Y., New Haven, etc., R. R. Co., 132 N. Y. 160.

Death by Negligence; See Negligence.

An action for damages for negligence or wrongful act causing death is wholly statutory. *Stuber v. McEntee*, 142 N. Y. 200.

Payment to a person who does not in a legal sense represent the action does not bar right of action. *Id.*

A compromise by a person having no present interest in such claim is not a bar to an action by such person in a representative capacity. *Id.*

Debtor and Creditor; See Assignment for Creditors; Compromise; Creditor's Suit; Fraudulent Conveyances; Insolvency; Mortgages; Partnership; Payments; Pledge; Subrogation; Trusts.

What transfer by an insolvent debtor is not within the statute

Debtor and Creditor—Continued.

prohibiting preferences in general assignment in excess of one-third of the assigned estate.

Tompkins v. Hunter, 149 N. Y. 117.

A debtor who, by direction of the creditor, pays money to a third person for the benefit of another, is not liable for a diversion of the money by such third person.

Knoch v. Von Bernuth, 145 N. Y. 643.

What transfers of property by debtor cannot be considered as a violation of the General Assignment Act.

Maas v. Falk, 146 N. Y. 34.

A lien on property, personal or real, given as security for debt, is not impaired because the remedy at law for the recovery of the debt is barred.

Hulbert v. Clark, 128 N. Y. 295.

An assignment of a contract with the United States is valid as between the parties, and vests in the assignees as against the contractor and his creditors who had notice of the assignment, with the right of subsequent payments for goods produced by them.

Matter of Home, 153 N. Y. 522.

Where personal property is assigned as collateral for a particular debt, creditor cannot, after payment of such debt, retain collateral as security for other debts.

Armstrong v. McLean, 153 N. Y. 490.

A secret agreement giving a benefit to one creditor is illegal, though it does not avoid a composition agreement between the creditor and debtor.

Hanover Nat. Bank v. Blake, 142 N. Y. 404.

Where the composition agreement provides for the execution of four series of notes by the debtor, the last two to be indorsed by a third person, a secret arrangement by which the latter indorses all the four notes of a particular creditor will not prevent the latter from recovering upon the indorsement of one of the later notes pursuant to agreement. *Id.*

Decedents' Estates ; See Executors and Administrators.

When a memoranda of indebtedness found among testator's papers is competent as an admission against the estate.

Matter of Gallagher v. Estate of Brewster, 153 N. Y. 364.

Such a memoranda might be considered with proof of services as an intent on the part of the testator to pay for such services.

Id.

The short Statute of Limitations cannot be evaded by successive presentations of same claims in different forms.

Titus v. Poole, 145 N. Y. 414.

A claim against a decedent's estate need not be stated with legal precision.

Id.

Where an action to recover for fraudulent representations is brought, and the plaintiff is nonsuited, an action based upon

Decedents' Estates—*Continued.*

such representations as warranties is within section 405 of the Code, and may be maintained if brought within a year. *Id.*
 What claims against decedent's estate are referable under the statute. *Matter of Van Slooten v. Dodge*, 145 N. Y. 327.
 What claim is not referable. *Id.*
 Duty of court, upon a refusal of one or more of the referees named to serve, to appoint others. *Hustis v. Aldridge*, 144 N. Y. 508.

Deceit ; *See Fraud.*

False representations as to a material fact peculiarly within a party's knowledge is ground for action. *Schumaker v. Mather*, 133 N. Y. 590.
 Otherwise where the party has the means of ascertaining the truth of the representations. *Id.*
 Where in the sale of stock a stockholder suffers loss on account of false statements of the corporation officers, an action for deceit may be maintained against such officers. *Rothmiller v. Stein*, 143 N. Y. 581.
 The plaintiff was not bound to verify the report made to him by the directors. *Id.*

Decree ; *See Equity Practice* ; *Judgment.*

Dedication ; *See Adverse Possession* ; *Easement* ; *Highways.*

What does not constitute a dedication of property for a public highway. *Mark v. Village of West Troy*, 151 N. Y. 453.
 Before land can become a public highway by dedication there must be an acceptance by some formal action of the public authorities. *People v. Underhill*, 144 N. Y. 316.
 What is not sufficient to show an acceptance by the village authorities. *Id.*

Deeds ; *See Adverse Possession* ; *Cloud on Title* ; *Covenants* ; *Execution and Supplementary Proceedings* ; *Foreclosure* ; *Judicial Sales* ; *Recording Conveyances* ; *Reformation of Instruments* ; *Title to Land* ; *Vendor and Purchaser.*

- I. EXECUTION, PARTIES AND VALIDITY.
- II. DELIVERY.
- III. CONSTRUCTION.
- IV. DESCRIPTION OF PREMISES.
- V. APPURTENANCES.
- VI. CONDITIONS AND RECITALS.
- VII. COVENANTS.

Deeds—Continued.

I. EXECUTION, PARTIES AND VALIDITY.

In the absence of explicit language, the court will regard circumstances attending execution of contract.

Dexter v. Beard, 130 N. Y. 549.

A grantee who takes a deed under an agreement to sell the land and account for the proceeds is entitled to convey such lands to a purchaser.

Wilson v. Parshall, 129 N. Y. 223.

The title of a *bona fide* purchaser in fee is not affected by the title under which tenants hold.

Minton v. N. Y. Elev. R. R. Co., 130 N. Y. 332.

A grantor having received the benefit of his deed, absolute in form, but intended as security for advances, cannot assert any claim to the title or right to redeem.

Id.

Possession by a third person under a tax lease does not void a deed.

King v. Townshend, 141 N. Y. 358.

A conveyance to three persons described as trustees of an association, as joint tenants, and to the survivor of them, his heirs and assigns, will give an authority to sell.

Id.

In order to constitute a breach of condition it must appear that the true spirit and purpose of a conveyance has been violated.

Rose v. Hawley, 141 N. Y. 366.

What does not constitute adverse possession against the remainderman rendering his deed void under the Champerty Act.

Sand v. Church, 152 N. Y. 174.

The record of an agreement to sell lands when they are acquired by the promisor, who has no title at the time, is not constructive notice to a subsequent mortgagee of the premises.

Oliphant v. Burns, 146 N. Y. 218.

The recording act protects a purchaser by a quitclaim deed against a prior deed which was unrecorded and of which he had no notice.

Wilhelm v. Wilken, 149 N. Y. 447.

Section 53 of the statute of uses and trusts, construed.

Schierloh v. Schierloh, 148 N. Y. 103.

In a conveyance of mineral ores, granite does not pass.

Armstrong v. Lake Champlain Granite Co., 147 N. Y. 495.

What passes under a conveyance where it appears from the deed that the intentions of the parties is that the mines shall be under ground.

Id.

When the Statute of Limitations begins to run in a case where a deed is so ambiguous on its face that it does not necessarily include more land than was intended to be conveyed.

DeForest v. Walters, 153 N. Y. 229.

When a trust deed of personal property was held not to be revoked by the will.

Townsend v. Allen, affirmed without opinion, 126 N. Y. 646.

A grantor of land by deed cannot retain ownership of a building by oral agreement.

Leonard v. Clough, 133 N. Y. 292.

Deeds—Continued.

Under 1 Revised Statutes, 739, section 143, only the estate of grantor passes, and a conveyance cannot affect interests in remainder.

Thompson v. Simpson, 128 N. Y. 270.

The provision was intended to do away with the doctrine of the ancient law whereby a feoffment made by a life tenant had the power of creating an actual estate, etc. *Id.*

When the word heirs may be construed as meaning children, and the grant to heirs be held for their benefit.

Heath v. Hewitt, 127 N. Y. 166.

II. DELIVERY.

Legal effect of delivery of a deed to third person with instructions to deliver it to grantee, vests title in grantee.

Rosseau v. Bleau, 131 N. Y. 177.

Delivery of deed duly executed, to be retained until after grantor's death and then recorded, carries a good title.

Diefendorf v. Diefendorf, 132 N. Y. 100.

Tender on the trial of an action for specific performance and deposit with the clerk of the court of a deed executed by all the vendors, is a good delivery in escrow, which is not defeated by the death of one of the vendors before its actual delivery to the purchaser.

Webster v. Kings County Trust Co., 145 N. Y. 275.

No presumption of the delivery of a deed can arise from an unauthorized record made half a century after the deed was drawn.

Cussack v. Tweedy, 126 N. Y. 81.

Under what circumstances a deed is to be regarded as undelivered and inoperative. *Id.*

III. CONSTRUCTION.

Usage of parties under an ancient grant aids in construing its obscure terms.

McRoberts v. Beyman, 132 N. Y. 73.

Where the owner of an entire block has filed a map showing an alley-way running from the center thereof, and has conveyed lots by separate deeds referring to said map, in some instances with a specific grant of the right of way of the alley, and in all cases mentioning the alley and referring to the way such deeds will be held to operate as a conveyance of the fee of one-half of such alley.

Hennessy v. Murdock, 137 N. Y. 317.

The intention of the parties, as shown by their acts, govern the construction of an instrument.

Harris v. Oakley, 130 N. Y. 1.

Where the owner executes and delivers a deed of real property, containing upon it a certificate of his appearance before an officer authorized by law to take acknowledgments at a place within his jurisdiction, and an acknowledgment of its execution, and

Deeds—Continued.

the certificate is signed by the officer, he cannot subsequently allege the invalidity of the certificate.

Mut. Life Ins. Co. v. Corey, 135 N. Y. 326.

One acquiring title under a mortgage subsequently executed by the grantor is equally bound by such deed. *Id.*

Section 936 of the Code, which declares that the certificate of acknowledgment of a conveyance is not conclusive and that it may be rebutted and the effect thereof contested by a party affected thereby, cannot be invoked to prevent the operation of an estoppel by deed. *Id.*

A subsequent agreement by a grantee who has received an absolute conveyance in payment of a debt without any defeasance in the deed, stipulating that if he sells the property he will give the grantor the refusal to purchase, or if he sells a part sufficient to pay the debt he will re-convey, does not convert the fee into a defeasible estate and permit recourse to the land in case the grantee disregarded the agreement.

Pond v. Harwood, 139 N. Y. 111.

A conveyance in fee, with reservation, is construed strongly against grantor. *Grafton v. Moir*, 130 N. Y. 465.

The reservation of a right of way means simply the right to pass over it. *Id.*

The way need only be such as is reasonably necessary and convenient. *Id.*

A conveyance of land should be construed so as to effectuate the intention of the parties.

Blackman v. Striker, 142 N. Y. 555.

An exception or reservation in a deed is to be taken most favorably to the grantee, and where there is doubt he should have its benefit. *Id.*

The intention of the parties is to be gathered by reading the entire context. *Id.*

Contemporaneous statements of grantees of rights to take "minerals or ores" is incompetent.

Armstrong v. Lake Champlain Granite Co., 147 N. Y. 495.

Where a party sold a lot according to a map first filed, and thereafter filed a second map, making an alley-way on the line of the lot first disposed of, it is held that the purchasers under the second map take title as described in the first map, subject to the easement created by the second map.

Howe v. Bell, 143 N. Y. 190.

IV. DESCRIPTION OF PREMISES.

An ancient deed bounding by a road refers to the road as used.

Blackman v. Riley, 138 N. Y. 318.

Where the description was "beginning at a point on the east side" of a road and thence running certain courses and dis-

Deeds—Continued.

- tances to the point of beginning, *held*, that no part of the road-bed was included. *Id.*
- A subsequent conveyance of a portion of one of lots by a description referring to the map, but in which the distances will only carry to the exterior of the alley, will be held, nevertheless, to pass the fee to the center of such alley.
Hennessy v. Murdock, 137 N. Y. 317.
- The rule is that as between grantor and grantees the conveyance of a lot, bounded upon a street in a city, carries the land to the center of the street. *Id.*
- How boundaries to land upon unopened street are to be determined.
Barrows v. Webster, 144 N. Y. 422.
- Where the lot reserved in a deed is identified by description and is practically located, no one can dispute the title thereto.
Second Methodist Episcopal Church v. Humphrey, 142 N. Y. 137.
- Courses and distances mentioned in conveyances must yield to the line as actually and duly made by survey.
Seneca Nation of Indians v. Hugaboom, 132 N. Y. 492.
- Where witnesses testify to the correctness of the terms of the earlier of two treaties, its terms will govern. *Id.*
- The presumption is that the line between two terminal points is a straight one. *Id.*
- Where a resurvey conflicts with the terms of a treaty the latter governs. *Id.*
- A party is bound by the conditions in a statute under which suit is brought. *Id.*

V. APPURTENANCES.

- Conveyances of land on Long Island Sound shore includes land between high and low water mark.
Oakes v. DeLancey, 133 N. Y. 227.
- A conveyance of land carries with it a water right in a stream within its boundaries.
Hall v. Sterling Iron & Railway Co., 148 N. Y. 432.
- A granting of a right to use water, construed. *Id.*
- Conveyances of an easement "for the ingress and egress along the alley line of the premises," construed.
Arnold v. Fee, 148 N. Y. 214.
- An intending purchaser of property adjacent to elevated road cannot presume that possession of company remains or continues wrongful.
Ward v. Metropolitan El. R. Co., 152 N. Y. 39.
- A person purchasing property, being on an elevated road, is put upon his inquiry that the company is in possession of certain easements. *Id.*
- Conveyances of land containing pond supplied from springs on

Deeds—Continued.

grantor's land, with the "appurtenances," conveys right to use of conduits to conduct the water.

Spencer v. Kilmer, 151 N. Y. 390.

A conveyance of lands bounded as along a highway, conveys the fee to the center. *Haberman v. Baker*, 128 N. Y. 253.

Where the grantor owns the whole highway presumption is that he intended to convey the whole. *Id.*

The abandonment of public easement in a highway causes the land to revert to former ownership. *Id.*

That there is no reference to adjacent owner of highway because of abandonment by public. *Id.*

The rule of *Lampman v. Milks*, 21 N. Y. 505, that when the owner of land sells a part thereof he impliedly grants to the grantee all those apparent and visible easements which are necessary for the reasonable use of the property granted and which are, at the time of the grant, used by the owner of the entirety for the benefit of the part granted, applied.

Paine v. Chandler, 134 N. Y. 385.

Rule that an easement to pass by implication must be necessary to the enjoyment of the estate granted, the necessity required is a reasonable, not an absolute one, applied in case where spring on grantor's property supplied premises conveyed with water. *Id.*

VI. CONDITIONS AND RECITALS.

Reservation in a deed "for the purpose of passing and repassing" to the street, construed.

Gillespie v. Weinberg, 148 N. Y. 238.

When a restriction as to the uses of lands for liquor purposes cannot be enforced.

Woodhaven Junction Land Co. v. Solly, 148 N. Y. 42.

Right of grantor to re-enter for breach of condition subsequent is not descendible or advisable.

Upington v. Corrigan, 151 N. Y. 143.

When a condition in a conveyance of land to an ecclesiastic, "his heirs and assigns," may be defeated by grantor. *Id.*

Grantor and his heirs only can take advantage of breach of condition subsequent. *Id.*

VII. COVENANTS.

A covenant providing that a way be used in common and not to be built upon by either party, runs with the land.

Dexter v. Beard, 130 N. Y. 549.

Damages which a grantee can recover for breach of a covenant against incumbrances, considered.

McGuskin v. Milbank, 152 N. Y. 297.

The rule that the covenant of a stranger to a title is personal to

Deeds—Continued.

- the conveyance, and incapable of transmission by mere conveyance of land, applied. *Mygatt v. Coe*, 152 N. Y. 457.
- When a surrender of possession by the wife of property owned by her jointly with her husband will not make his covenants in the deed executed by both as to her title attach to and run with the land. *Id.*
- Restrictive covenants in several deeds in different portions of a block, construed. *Equitable Life Assurance Soc. v. Brennan*, 148 N. Y. 661.
- What legal possession of land is sufficient to carry covenants. *Mygatt v. Coe*, 147 N. Y. 456.
- The fact that the covenant runs to the grantee, "his heirs and assigns," does not dispense with the necessity of privity of estate in order to carry the covenants with the land. *Id.*
- When a husband who merely lives with his wife has no legal possession of land which can support his covenants of warranty in a deed made by them both. *Id.*
- The husband is entitled to testify as to whether he received any part of the consideration when he sued for breach of covenants as bearing on the question of his possession. *Id.*

Default, Judgment by ; See Judgment.**Defenses ; See Separate Titles of Actions.**

- Pleading want of consideration through invalidity of a patent is a proper defense to an action for royalties. *Herzog v. Heyman*, 151 N. Y. 587.
- What is not a defense to an action for violation of a municipal ordinance regulating the speed of trains. *City of Buffalo v. N. Y., L. E. & W. R. R. Co.*, 152 N. Y. 276.
- A domestic corporation set up as a defense in abatement in an action for a debt, that the debt had been attached in another state in an action brought against all the parties to recover a debt owing by plaintiffs. It appearing that the only jurisdiction of the foreign court rested upon the authority of its statutes to attach the debt, and that it had otherwise acquired no jurisdiction of the person or property of defendant, *held*, the rights of the creditor here could not be defeated by such attachment. *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209.
- In an action of trespass or trover, an answer or title in a stranger which does not connect defendant with such title is insufficient. *Stonebridge v. Perkins*, 141 N. Y. 1.
- Where a former action has been discontinued, the later action may be prosecuted. *Crossman v. Universal Rubber Co.*, 131 N. Y. 636.

Defenses—Continued.

Evidence of the termination of the former action must be in the form of some judicial declaration to that effect. *Id.*

Definitions.

The word "heirs" in a bequest of a personal property defined. *Montignani v. Blade*, 145 N. Y. 11.

Delivery; *See Bills and Notes*; *Carriers*; *Deeds*; *Fraudulent Conveyances*; *Sales*; *Statute of Frauds*.

Demands; *See Bills and Notes*; *Conversion*; *Tender*; *Vendor and Purchasers*.

Demurrage; *See Ships and Vessels*.

When parties understood that but one boat could be loaded at a time, a claim for demurrage for more than one boat cannot be made. *Riendeau v. Bullock*, 147 N. Y. 269.

Under peculiar provisions demurrage may include the loading and stowing of the cargo upon the vessel.

Baldwin v. Sullivan Timber Co., 142 N. Y. 279.

After the demurrage begins to run Sundays are not to be deducted in calculating it. *Id.*

Though a consignee may be bound to pay the freight he is not liable for demurrage in the absence of an express agreement to be so. *Dayton v. Parke*, 142 N. Y. 391.

Where the vessel is detained through the fault of the consignee, he may be liable for damages in the nature of demurrage. *Id.*

In such case the detention must be proved, as well as the damages and their nature. *Id.*

It is necessary to show that the bill of lading, by its reference to the charter-party upon the point of demurrage, makes the provisions of the charter-party part of the bill of lading in order to prove that the former was included in the latter. *Id.*

If nothing be contained in the bill of lading as to demurrage, no contract is proved from an acceptance of the cargo under a promise to pay freight. *Id.*

Demurrer; *See Pleadings*.

Depositions; *See Practice*.

Descent; *See Aliens*; *Executors and Administrators*.

In equity the course of descent of particular lands may be changed by agreement of the tenants in common.

Murphy v. Whitney, 140 N. Y. 541.

Descent—*Continued.*

Moneys received by the committee of a lunatic upon release of an easement constitute real property and descend to the heirs.

Ford v. Livingston, 140 N. Y. 162.

The personal representatives have no interest in such fund. *Id.*

Determination of Claim to Real Property; *See Ejectments.*

An oral agreement to convey made by one who had no color of title is insufficient to pass title.

Bohn v. Hatch, 133 N. Y. 64.

Though plaintiff had entered and built upon such property, he is not entitled to equitable relief. *Id.*

Where the statute requires a certain period of possession, proof of possession by husband and wife will support a claim to such possession by the wife.

Diefendorf v. Diefendorf, 132 N. Y. 100.

Where plaintiff occupied two floors and leased the remainder of the house, actual possession is made out. *Id.*

Devise; *See Executors and Administrators*; *Legacies*; *Trusts*; *Wills.***Dictum.**

The decision of one of several questions on appeal does not render the remaining questions decided *obiter dictum*.

Directors; *See Corporations.***Disability**; *See Statute of Limitations.***Discharge**; *See Bankruptcy*; *Judgment*; *Mortgage.*

Claims for money received by a bankrupt as agent are barred by discharge in bankruptcy.

Mulock v. Byrnes, 129 N. Y. 23.

Discontinuance; *See Practice.***Disorderly Person**; *See Criminal Law.*

A husband living apart from his wife in pursuance of a decree of separation obtained by her cannot be convicted as a disorderly person for non-support.

People ex rel. Commissioners of Charities v. Cullen, 153 N. Y. 629.

Section 20 of chapter 601, Laws 1895, authorizing the Court of Appeals to review an order convicting a party as a disorderly person, is not unconstitutional. *Id.*

Disorderly Person—Continued.

An appeal does not lie from a decision of the Appellate Division in a proceeding against a husband for failure to support his wife.

People ex rel. Comrs. of Public Charities & Correction v. Cullen, 151 N. Y. 54.

A husband, adjudged a disorderly person for failure to support his wife, is subject to arrest in a similar proceeding though appeal in first is pending.

People ex rel. Lichtenstein v. Hodson, 126 N. Y. 647.
It seems that it would have been otherwise if he had been imprisoned for the first conviction or had given the undertaking required for the support of his wife. *Id.*

Where the defendant in such proceedings denies that he is the husband of the complainant, the justice has the jurisdiction to try the question of marriage. *Id.*

Dividends; See Corporations.**Divorce.****I. CONFLICT OF LAWS.****II. ALIMONY.****III. PROOF, PRACTICE AND PLEADING.****I. CONFLICT OF LAWS.**

As to the residence of parties married within the state as affecting the jurisdiction of the court.

Gray v. Gray, 143 N. Y. 354.

Effect of judgment of another state.

Rigney v. Rigney, 127 N. Y. 408.

A judgment for alimony and costs cannot be supported on the ground that they are mere incidents of and subordinate to the right to a divorce. *Id.*

II. ALIMONY.

Where the party submits to the jurisdiction of the court he cannot dispute payment of alimony and counsel fees.

Gray v. Gray, 143 N. Y. 354.

Plaintiff may move for alimony not provided for in judgment without opening the judgment of divorce.

Galusha v. Galusha, 138 N. Y. 272.

Time of commencing payment of is in discretion of the court.

McCarthy v. McCarthy, 143 N. Y. 235.

When alimony can be otherwise collected the surplus income of a testamentary trust may be enforced in equity for the payment of the alimony. *Wetmore v. Wetmore*, 149 N. Y. 520.

A testamentary trust is not annulled by a judgment requiring

Divorce—Continued.

the application of the surplus of said trust to the payment of alimony. *Id.*

When it is shown that defendant has an income other than the one derived from the testamentary trust it is not necessary that the judgment granting alimony should apportion the income. *Id.*

III. PROOF, PRACTICE AND PLEADING.

It is not incumbent upon the plaintiff, where the defendant denies the charge of adultery, to prove affirmatively the allegations in the complaint that the adultery was committed without the connivance of the plaintiff.

McCarthy v. McCarthy, 143 N. Y. 235.

Where the husband defendant failed to appear as a witness but slight corroboration of the testimony against him was required. *Id.*

When an allowance to enable the wife to carry on or defend the action under section 1769 of the Code should not be decreed to defray expenses already incurred.

McCarthy v. McCarthy, 137 N. Y. 500.

The term desertion contemplates a voluntary separation of one party from the other without intention of returning and without justification.

Williams v. Williams, 130 N. Y. 193.

Where the separation is caused by conduct of one of the parties it is not voluntary. *Id.*

Upon the wife's offering to return, the husband was without legal excuse in offering to receive her. *Id.*

In an action by the wife for separation, a decree of divorce obtained in another state by husband cannot be set up in evidence. *Id.*

The wife is entitled to compel the husband to comply with the decree of the courts of the state under the Constitution of United States. *Id.*

Domestic Relations ; *See Guardian and Ward ; Husband and Wife ; Infants ; Parent and Child.*

Domicile ; *See Conflict of Laws.*

Dower.

Dower cannot be claimed in land bought for a third party with the husband's money, and over which he exercises full control, unless the husband is seized of the land in law or in fact.

Phelps v. Phelps, 143 N. Y. 197.

When dower becomes consummate upon the death of a husband who was the beneficiary of the trust.

Clark v. Clark, 147 N. Y. 639.

Dower—*Continued.*

Priority of a right of dower of wife of devisee from an annuitant, considered. *Id.*

When property comes to a husband subject to a lien, the wife's inchoate right of dower is also subject to the lien. *Id.*

A devise *held* one in lieu of dower, and acceptance forfeits the right of dower. *Nelson v. Brown*, 144 N. Y. 384.

Judgment directing a sale subject to dower does not determine right to dower as against a purchaser at the sale, or his grantee, where wife was not made party to foreclosure. *Id.*

Although a wife only has an inchoate right of dower, yet she may maintain an action to cancel a deed which is recorded, on the ground of forgery. *Clifford v. Kampfe*, 147 N. Y. 383.

When such action may be maintained, considered. *Id.*

A wife may give power of attorney to her husband authorizing him to execute a release of her right of dower.

Wronkow v. Oakley, 133 N. Y. 505.

The dower right of one divorced in another state determined by the laws of this state. *Cleaf v. Burns*, 133 N. Y. 540.

To deprive her of dower here the misconduct must be adultery. *Id.*

Drains and Drainage; *See Municipal Corporations.***Duress**; *See Deceit*; *Fraud.*

It seems that the release of a cause of action for malicious prosecution was executed after bail had been given and against the advice of counsel, so a finding that the party was not coerced was justified. *Stono v. Weiller*, 128 N. Y. 655.

A contract obtained by duress is not ordinarily void but only voidable, and it may be subsequently ratified and confirmed.

Oregon Pacific R. R. Co. v. Forrest, 128 N. Y. 83.

One entitled to repudiate a contract on the ground of duress should act promptly. *Id.*

A mere refusal to pay balance due under contract does not constitute duress.

Doyle v. Rector, etc., of Trinity Church, 133 N. Y. 372.

E.**Easements**; *See License*; *Party Walls*; *Railroads.*

It seems that an easement to do some act of a permanent nature on the land of another can be created only by a deed.

White v. Manhattan Ry. Co., 139 N. Y. 19.

It seems that a license to such effect may be revoked at any time. *Id.*

Easements—Continued.

The question of abandonment of an easement is ordinarily one of intent. *Hennessy v. Murdock*, 137 N. Y. 317.

The mere use of an easement for a purpose not authorized, and the excessive use or misuse of it, are not sufficient to constitute an abandonment.

Roby v. N. Y. Central, etc., R. R. Co., 142 N. Y. 176.

The acts claimed to constitute an abandonment of an easement must be such as to show an intention to abandon and permanently give up the easement. *Id.*

The fact that a railroad has leased lands with the right to use part of them does not show an abandonment. *Id.*

The lessee should be made a party to the action for ejectment by the owner in fee of the land burdened by the easement. *Id.*

It is an error in refusing to find that landing was established by adverse possession when way is claimed as essential to use as a ferry landing. *Iselin v. Starin*, 144 N. Y. 453.

Conveyances of land containing pond supplied from springs on grantor's land with the "appurtenances" conveys right to use of conduits to conduct the water.

Spencer v. Kilmer, 151 N. Y. 390.

A grantor is not liable for destruction of appliances which when the land was granted was owned by a third party but which was subsequently acquired by grantor. *Id.*

Damages for diverting water from defendant's pond, considered. *Id.*

What constitutes an abandonment of easement.

Ward v. Metropolitan El. R. Co., 152 N. Y. 39.

Right of tenant in common to use lands held by him in severalty, discussed. *Palmer v. Palmer*, 150 N. Y. 139.

This right of way lasts so long as the necessity for it remains. *Id.*

When an easement by necessity is not extinguished. *Id.*

When by necessity a right of way over grantor's land is created by the conveyance of the lands. *Id.*

No restrictive easement in favor of one lot of land is to be inferred because the adjoining land is subject to the easement.

Equitable Life Assurance Soc. v. Brennan, 148 N. Y. 661.

Case in which it was held that a release of easements did not sever the easements from the land, but reinvested them in the owner of the land.

Macy v. Metropolitan El. R. R. Co., affirmed without opinion, 128 N. Y. 624.

Right of grantee of land to use of street bounding his property which has not been accepted by the public, declared.

Haight v. Littlefield, 147 N. Y. 338.

Although the way at the time of the granting was obstructed the grantee of land acquires a right of way as appurtenant to the land conveyed to him. *Id.*

Easements—Continued.

An easement "for ingress and egress along the alley line of the premises" is not restricted to any particular mode of travel.

Arnold v. Fee, 148 N. Y. 214.

Easement in an alley "for the purpose of passing and repassing to the street," considered.

Gillespie v. Weinberg, 148 N. Y. 238.

When a grantor does not abandon easement by a transfer of the property.

Foote v. Metropolitan El. R. R. Co., 147 N. Y. 367.

Where one of two parcels of land is conveyed absolutely, an easement will be implied in favor of the remaining parcel where it is necessary for the enjoyment of remaining parcel.

Wells v. Garbutt, 132 N. Y. 430.

Where the privilege of overflowing one of two parcels of land was not reserved in a conveyance, it is lost. *Id.*

When it is claimed that an easement exists by necessity, evidence of the necessity must be given. *Id.*

Reasonable necessity, as distinguished from mere convenience, must be shown. *Id.*

The provisions that an easement must be kept open for passage does not prevent from building over the easement so as to leave a sufficient passage.

Hollins v. Demorest, 129 N. Y. 676.

The street rights of abutting owners are not common-law easements, but an easement for lateral support in adjacent land.

Stevens v. N. Y. Elev. R. R. Co., 130 N. Y. 95.

Ejectment; See Determination of Claim to Real Property.**I. WHEN MAINTAINABLE.****II. PLEADING AND PRACTICE.****I. WHEN MAINTAINABLE.**

When purchaser on foreclosure of the mortgage on leasehold property has no right to possession as against grantee in possession under a conveyance from lessor.

Shultes v. Sickles, 147 N. Y. 704.

When an action of ejectment will not lie against the husband of wife, a tenant with whom he lives on the land and who claims possession of it.

Danihee v. Hyatt, 151 N. Y. 493.

Possession acquired by ejectment against a life tenant does not affect the rights of the remainderman.

Sand v. Church, 152 N. Y. 174.

What does not constitute adverse possession against the remainderman rendering his deed void under the Champerty Act. *Id.*

In an action by a remainderman to redeem after a default, a judgment in ejectment against the life tenant is equitable in its nature, and may be sustained without any proof of fraud. *Id.*

Ejectments—Continued.

The six months Statute of Limitations does not apply to an action of redemption brought by the remainderman in a case where the landlord had proceeded only against the life-tenant. *Id.*

Unless he show title in the original patentee, or possession in himself or his grantors, the plaintiff cannot recover lands on a seashore.

Greenleaf v. Brooklyn, Flatbush, etc., R. R. Co., 141 N. Y. 395.

Actual possession sufficient to raise a presumption of title cannot be shown from the mere payment of taxes, claim of title and assertion of ownership. *Id.*

Where the complaint alleged ownership of real estate in plaintiff and a forcible entry and detainer by defendant, and demanded treble damages, *held*, that the action was properly regarded as one of ejectment, and that plaintiff was entitled to a new trial upon compliance with Code Civil Procedure (§ 1525).

Compton v. Chelsea, 139 N. Y. 538.

Where, after a grant of land bounded by the side of the highway, to the center of which the grantor owned, the highway was discontinued and the successor of the grantor brought ejectment for the strip in front of the premises conveyed, *held*, that although he was entitled to possession it was subject to the right of the grantee to have the part of the former highway in front of his premises kept open.

Hallaway v. Southmay, 139 N. Y. 390.

The plaintiff must recover upon the superiority of his own title.

McRoberts v. Bergmann, 132 N. Y. 83.

Possession for more than twenty years under claim of title establishes *prima facie* title. *Id.*

II. PLEADING AND PRACTICE.

A stipulation for trial before a referee is not vacated by an order granting a new trial. *Brown v. Root Mfg. Co.*, 148 N. Y. 294.

Section 1011 of the Code applies to a new trial in ejectment granted in section 1525. *Id.*

In ejectment the new trial is allowed as a matter of course, under Code Civil Procedure. (§ 1525). It cannot, therefore, be had, where a judgment absolute has been directed by the Court of Appeals upon a stipulation therefor.

Roberts v. Baumgarten, 126 N. Y. 336.

An extra allowance is an item of costs and may properly be included in the condition of granting a new trial in ejectment under Code Civ. Procedure, (§ 1525).

Wing v. De La Rionda, affirmed without opinion, 126 N. Y. 580.

Proof of some equitable right or title in a third person with whom defendant does not connect himself is no defense.

Wing v. De La Rionda, 131 N. Y. 422.

Ejectment—Continued.

The submission of the question of the authority of the president of a company to make and execute a deed, and the submission by the court of the question of mistake, does not constitute a mistrial. *Forest v. Walters*, 153 N. Y. 229.

In an action of ejectment brought by grantee of property at a sheriff's sale, which was vacated, defendant may show that plaintiff was not a *bona fide* purchaser by proof that she was the mother of the plaintiff in a former action and that all their property was held in common. *Cottle v. Simon*, 153 N. Y. 403.

Where defendant has shown that plaintiff and her daughter held their property in common, plaintiff should be permitted to show that the property which was the subject of the former action is owned solely by the daughter. *Id.*

When in an action of ejectment, the death of plaintiff's mother who was born 92 years before the trial will be presumed.

Clason v. Baldwin, 152 N. Y. 294.

A grant by the state evidenced by a patent duly issued cannot be impeached collaterally upon the trial of an action of ejectment.

De Lancey v. Piegras, 138 N. Y. 26.

In an action of ejectment defendant will not be permitted to set up an escheat to the state. *Croner v. Cowdrey*, 139 N. Y. 471.

Election of Remedies ; See Dower ; Wills.

Neither the pendency nor bringing of an action by a creditor to avoid a general assignment on the ground of fraud will bar his right to come in and share in the distribution of the assigned estate. *Mills v. Parkhurst*, 126 N. Y. 89.

Doctrine of election of remedies, discussed. *Id.*

An assignee cannot impair the interests of his *cestuis que trustent* by the prosecution of a remedy of which he had been advised.

Bowdish v. Page, 153 N. Y. 104.

A plaintiff is not estopped from setting up and proceeding upon the theory of illegal sale, where he has commenced an action to reach the proceeds of stock, where he has learned after commencing the action that the sale was unlawful.

Smith v. Savin, 141 N. Y. 315.

Where a judgment against a partner is returned unsatisfied, an action against others who have misappropriated firm property is not barred. *Russell v. McCall*, 141 N. Y. 437.

Does not exist where the pleadings were subsequently amended so as to exclude the matter which was claimed to constitute the election. *Shaw v. Broadbent*, 129 N. Y. 114.

Party who has been induced by fraudulent representations to sell his goods to another, electing to ratify the sale after full knowledge, is bound by such election.

Bach v. Tuch, 126 N. Y. 53.

Election of Remedies—Continued.

The fact of making of similar fraudulent representations to others is merely cumulative evidence on the question of intent. *Id.*

What is an affirmation of sale such as will defeat subsequent actions in avoidance of the sale based on contemporaneous fraudulent representations to other creditors. *Id.*

A proceeding in equity in another state by the plaintiff against insolvent corporation which proceeded in affirmation of a sale, is not inconsistent with a subsequent action in this state to recover upon the notes given for the purchase-money.

Crossman v. Universal Rubber Co., 127 N. Y. 34.

It is proper for the plaintiff to show, in order to maintain the action, that nothing had been or could be realized in the proceedings in the other state. *Id.*

Election of Officers; See *Mandamus*; *Naturalization*; *Office*.

A candidate intending to proceed by *mandamus* under section 31 should procure an alternative writ, so that if there should be any dispute about facts that can be settled before the peremptory writ issues.

People ex rel. Hasbrouck v. Supervisors of Dutchess, 135 N. Y. 522.

The ballot reform law renders invalid a ballot marked for identification, whether by the voter or another person, with his knowledge and assent. *Id.*

It is not needful, in order to invalidate the ballot, to show who the voter was, but it is sufficient to show by any competent evidence that the ballot was marked. *Id.*

Where a *mandamus* was granted commanding the mayor of Albany to publish lists of inspectors and poll-clerks, adopted against the protest of the minority, though selected by representatives of the two principal parties, the order should be reversed.

Matter of Manning, appeal dismissed, 139 N. Y. 446.

Chapter 934, Laws 1895, annexing a portion of Westchester county to the city and county of New York, construed.

People ex rel. Henderson v. Supervisors of Westchester Co., 147 N. Y. 1.

The election of a public officer must be referred to the day upon which the electoral body expresses its choice by voting, and there is no distinction between town and other elections.

People ex rel. Le Roy v. Foley, 148 N. Y. 877.

The division of assembly districts under article 3, section 5 of the Constitution is discretionary that the board of supervisors and their division may be based on peculiar facts which may exist.

Matter of Smith v. Supervisors of St. Lawrence Co., 148 N. Y. 187.

Election of Officers—Continued.

Article 3, section 5 of the Constitution, for the division by the supervisor of assembly districts, construed. *Id.*

An appeal lies to the Appellate Division of the Supreme Court from an order made under the Election Law reviewing the determination of the filing officer upon a contested certificate of nomination. *Matter of Emmett*, 150 N. Y. 538.

Section 56 of the Election Law, which provides that an order reviewing the determination of an officer, with whom a contested certificate of nomination has been filed, must be made on or before the last day fixed for filing certificates of nominations to fill vacancies with such officers, applies only to an original order of review provided for therein. *Id.*

A county clerk has no authority to insert in a party column on the official ballot the name of a candidate other than those who have been duly nominated and certified by the party whose name heads the column.

Matter of Madden, 148 N. Y. 136.

Section 105 of the Election Law, as amended by chapter 810 of 1895, that "none but ballots provided in accordance with the provisions of this act shall be counted," construed.

People ex rel. Hirsh v. Wood, 148 N. Y. 142.

The votes of innocent electors are not invalidated by irregularities on the part of public officers charged with the duty of preparing official ballots. *Id.*

An official ballot is not marked within the law because of any irregularity or defect in making it up or printing it. *Id.*

Provisions of law relative to voting must be substantially complied with.

People ex rel. Nicholas v. Board of County Canvassers of Onondaga, 129 N. Y. 395.

A *mandamus* will issue to prevent canvass of ballots bearing irregular indorsement. *Id.*

An official ballot bearing an indorsement of a district other than that in which it is used is irregular. *Id.*

The provisions prohibiting the canvassing of any mutilated ballot refer to official ballots. *Id.*

The pasting of ballots for a candidate on the official ballot, while it makes vote for such candidate void, does not vitiate the official ballot. *People ex rel. Bradley v. Shaw*, 133 N. Y. 493.

The statute was not intended to prevent a voter from voting for whom he chooses. *Id.*

Where the county clerk refuses to sign report of board of canvassers, the board may designate one of its members to sign.

People ex rel. Daley v. Rice, 129 N. Y. 449.

The steps thus taken to authenticate the report of the proceedings are valid. *Id.*

When the returns of a canvass are claimed to be illegal, and such

Election of Officers—Continued.

- claim is not denied in the opposing papers, the court may direct the state board to canvass. *Id.*
- The duty of the state board is to determine the result of the election. *People ex rel. Derby v. Rice*, 129 N. Y. 461.
- The statements returned to the state board must contain only what is required. *Id.*
- The return of any other matter will be disregarded. *Id.*
- Mandamus* will lie to compel the county board of canvassers to send back returns for correction.
- People ex rel. Munro v. Board of Canvassers of Onondaga*, 129 N. Y. 469.
- The court may consider the ineligibility of a party, and refuse relief where such ineligibility is established.
- People ex rel. Sherwood v. State Board of Canvassers*, 129 N. Y. 360.
- Such determination is not conclusive upon the state senate in considering the eligibility of a member. *Id.*
- State board of canvassers has no power to go outside returns of county canvassers. *Id.*
- Court will not aid one who is ineligible to office. *Id.*
- The court cannot compel the secretary of state to return a resolution of county board of canvassers.
- People ex rel. Sherwood v. Rice*, 129 N. Y. 391.
- The state committee and the state convention have the right to settle dispute as to which two sets of delegates of an assembly convention were regular. *Matter of Fairchild*, 151 N. Y. 359.
- There is no power in a congressional district convention called solely to elect delegates to a national convention to appoint new congressional committee. *Id.*
- The court should rely upon the action and decision of the regularly constituted party authorities in deciding question of regularity of nominations and delegates. *Id.*
- Where a review of determination of a filing officer on a contested certificate of nomination must be had. *Id.*
- Upon what papers review is determined. *Id.*
- Application of the provisions of the Election Law authorizing the filing officer to select a device and party name for factional candidates not recognized by constituted party authorities, considered. *People ex rel. Ward v. Roosevelt*, 151 N. Y. 369.
- Duty of village clerk to administer oaths is ministerial, and can be required by *mandamus*.
- People ex rel. Young v. Straight*, 128 N. Y. 545.
- Omission of name from the official ballot, a voter is warranted in writing or pasting upon such ballot the name of such office and of the person for whom he desires to vote.
- People ex rel. Goring v. Prest., etc., of Wappingers Falls*, 144 N. Y. 616.

Election of Officers—Continued.

Mandamus will lie to compel the recognition of a person receiving a majority of votes for the office in such a case. *Id.*

Intent to make a change of residence for the purpose of voting must be shown by proof of acts.

Matter of Garvey, 147 N. Y. 117.

What is sufficient to show a change of residence. *Id.*

A judge at chambers in proper case may strike a name from a registry list. *Id.*

It is the duty of a board of county canvassers to determine, from the documentary evidence before them, the number of votes given to each candidate respectively.

People ex rel. Noyes v. Canvassers of Chemung, 126 N. Y. 392.

Canvassers must be governed by writing inserted in body of paper as to number of votes cast for candidates. *Id.*

What the certificate under the former election law should have contained. *Id.*

No residence is acquired by a person committed to prison at his own request, and who is allowed to go in and out of prison.

People v. Cady, 143 N. Y. 100.

The registry of such a person is illegal and punishable upon conviction. *Id.*

In the designation of newspapers to publish the list of nominations, the police commissioners act judicially, and their determination according to their best information is not reviewable in the courts.

People ex rel. Press Pub. Company v. Martin, 142 N. Y. 228.

An affidavit that a newspaper has the largest circulation in the United States does not establish the fact of its circulation in the city of New York. *Id.*

A person who induces another to conceal the list of registered voters and refuses to permit the public to gain access thereto is guilty of violating the law.

People v. McKane, 143 N. Y. 455.

It is not necessary to show conspiracy in an indictment for such an offense, because if shown it is evidence from which the jury may find the main fact. *Id.*

Electrical Companies ; *See Manufacturing Corporations.*

Elevated Railroads ; *See Railroads.*

Embezzlement ; *See Criminal Law.*

Emblements ; *See Landlord and Tenant ; Executors and Administrators.*

Eminent Domain ; See Compensation ; Highways ; Railroads.

- I. THE POWER.
- II. THE TAKING.
- III. PROCEEDINGS AND PRACTICE.
- IV. COMPENSATION.

I. THE POWER.

When a statute authorizes the condemnation of land for public use, the legislature cannot subsequently repeal the conditions on which the land was taken, and prevent the construction of a railroad through a street laid out upon the terms that none should be permitted to run through it.

Matter of Southern Boulevard R. R. Co., appeal dismissed, 128 N. Y. 93.

Where additional land for its use is needed, a foreign railway corporation operating under the laws of this state may acquire the same by condemnation proceedings.

N. Y., New Haven, etc., R. R. Co. v. Welsh, 143 N. Y. 411.

Lands used as a private cemetery may be condemned for public use unless protected by statute.

Matter of Bd. of Street Opening, etc., of New York, 133 N. Y. 329.

But otherwise in case of a public cemetery. *Id.*

Where no burials can be made except by consent of church corporation the land is devoted to a private use. *Id.*

Legislature has power to take property for public use.

Pocantro Water Works v. Bird, 130 N. Y. 249.

This use may be limited to the inhabitants of a small locality, but it must be in common. *Id.*

The question of public use is a judicial one. *Id.*

An agreement by a third party does not destroy the public use requisite to condemnation proceedings. *Id.*

The New York & Long Island Company under its charter as amended is an existing corporation with power to take lands for its purposes, which includes running eastwardly to Third Ave.

New York & Long Island Bridge Co. v. Smith, 148 N. Y. 540.

Property required for canal purposes may be taken without the aid of any judicial proceeding, and Constitution, article 1, section 7, does not apply.

Waterloo Woolen Mfg. Co. v. Shanahan, 128 N. Y. 435.

The rights of the state cannot be impaired by user by a party. *Id.*

When water is being taken for public use, plaintiff should establish his rights in the Court of Claims and should not stop the work of public improvement. *Id.*

Eminent Domain—Continued.**II. THE TAKING.**

Case in which it was *held*, that the use for which the lands were sought was not a public one, and that the refusal to grant the petition was proper.

Matter of Split Rock Cable Road Co., 128 N. Y. 408.

Held, also that failure to file a map was of itself a serious objection to the application. *Id.*

A possible limited use by a few persons is not sufficient to authorize the taking of private property against the will of owner. *Id.*

Vested rights cannot be divested by subsequent enactment.

Rumsey v. N. Y. & New England R. R. Co., 130 N. Y. 88.

A conveyance under chapter 559, Laws 1871, made thereafter and before an award, transfers the right to the award to grantee who owns when city actually takes possession.

Magee v. City of Brooklyn, 144 N. Y. 265.

III. PROCEEDINGS AND PRACTICE.

Where husband and wife are seized of an estate as tenants by an entirety, and when in a proceeding to condemn a right of way the husband alone is served, the wife may restrain the construction of a sewer across the property.

Grosser v. City of Rochester, 148 N. Y. 235.

Section 3372 of the Code giving an allowance in condemnation proceedings does not apply to proceedings taken under a special act, but costs in such a proceeding are governed by section 3340.

Matter of City of Brooklyn, 148 N. Y. 107.

Where specific performance would be unavailing, the party entitled to it should be allowed to establish a claim for damages sustained.

People ex rel. Eckerson v. Trustees of Haverstraw, 151 N. Y. 75.

Where the General Term reverses an order refusing to affirm an award, and affirms such award, it is error to include therein interest from the date of the Special Term order.

Matter of N. Y. & Brooklyn Bridge, 137 N. Y. 95.

An appellate court will not set aside an award of commissioners to acquire lands for public purposes or reverse the decision of the Special Term confirming their report, unless it is made to appear that they adopted some wrong principle in arriving at the value of the land. *Matter of City of Rochester*, affirmed, 137 N. Y. 243.

The violation of a private contract by a railroad company is no valid objection to condemnation proceedings instituted by it.

Matter of Long Island R. R. Co., 143 N. Y. 67.

The courts cannot validate a wrongful entry.

Matter of St. Lawrence & Adirondack R. R. Co., 133 N. Y. 270.

Eminent Domain—*Continued.*

Whether the legislature can authorize a trespasser to continue in possession pending condemnation proceedings,—*quere.* *Id.*

Where condemnation proceedings are successfully resisted, the remedy for injury is by action. *Id.*

IV. COMPENSATION.

On appeal, an award of damages to property by the diversion of water required to supply a city, the Court of Appeals cannot assume that the commission failed to take into consideration a particular item of damages as to which conflicting evidence was taken. *Matter of Thompson*, 127 N. Y. 463.

Party who holds the title when an actual appropriation of the land is made is entitled to the award under chapter 559 of 1871.

Delap v. City of Brooklyn, 144 N. Y. 265.

In fixing the value of property occupied by tenants in proceedings under the condemnation act, the appraisers may appraise the entire value of the premises and then apportion such value among the fee owners and tenants, or they may appraise the value of each separate interest.

Matter of N. Y. & Brooklyn Bridge, 137 N. Y. 95.

Employer and Employee; *See Master and Servant*; *Negligence*; *Railroads.*

Entirety, Tenancy by; *See Husband and Wife.*

Equitable Conversion; *See Devise.*

Equity; *See Agency*; *Cancellation*; *Cloud on Title*; *Contracts*; *Corporations*; *Creditor's Suit*; *False Representations*; *Foreclosure*; *Fraud*; *Fraudulent Conveyances*; *Injunction*; *Mistake*; *Partnership*; *Purchaser for Value*; *Receivers*; *Reformation of Instruments*; *Specific Performance*; *Trusts*; *Wills.*

I. JURISDICTION.

II. PLEADING AND PRACTICE.

I. JURISDICTION.

A court of equity will not determine the restrictive right and interest of persons arising out of an unlawful agreement.

Unckles v. Colgate, 148 N. Y. 529.

Where real property becomes vested in the last survivor under an agreement that it should vest in another upon death of the survivor, the former has an interest which equity will protect.

Murphy v. Whitney, 140 N. Y. 541.

When jurisdiction of a court of equity has once attached it is not

Equity—Continued.

affected by subsequent changes so long as any cause of action survives. *Van Allen v. New York El. R. R. Co.*, 144 N. Y. 174.
Case when court will await money judgment when it cannot direct reconveyance of property obtained by fraud.

Valentine v. Richardt, 126 N. Y. 272.

Equity will intervene where there is no adequate remedy at law.

Nat. Park Bank v. Goddard, 131 N. Y. 494.

Equity of redemption is now a legal estate.

Macaulay v. Smith, 132 N. Y. 524.

Once a mortgage always a mortgage.

Id.

Stare decisis does not apply where the law has been misunderstood or misapplied.

Rumsey v. N. Y. & New England R. R. Co., 133 N. Y. 79.

Where a statute authorizes relief at law which was ordinarily awarded in equity, such statute does not bar equitable relief.

Kinnan v. Forty-Second Street, etc., Ry. Co., 140 N. Y. 183.

A remedy which decrees the giving of an indemnity bond and the issue of a new certificate of stock is wholly and clearly an equitable remedy.

Id.

II. PLEADING AND PRACTICE.

A judgment obtained by a fraud should not be opened without reserving the right to contest the original claim.

Kley v. Healey, 149 N. Y. 336.

What facts must be alleged to allow Supreme Court to take jurisdiction of all, account for an accounting, and after having obtained jurisdiction what disposition such court will make.

Sanders v. Soutter, 126 N. Y. 193.

Proper actions in equity considered.

Id.

In an equity action, the court having obtained jurisdiction of the parties and subject of the action, will bring its relief down to the trial. *Kilbourne v. Supervisors of Sullivan*, 137 N. Y. 170.

When the doctrine of acquiescence as a defense to an equity suit generally obtains.

Galway v. Metropolitan Elevated Ry. Co., 128 N. Y. 132.

The rule requiring promptness in asking the aid of a court of equity is always applied in the discretion of the court.

Id.

Error, What Assignable as ; *See Appeal ; Criminal Law ; Judgment ; New Trial ; Practice ; Reference.*

Error, Writ of ; *See Appeal ; Criminal Law.*

Escape ; *See Arrest ; Sheriff.*

Escheat.

Where a woman to whom the state had released its right to her

Escheat—*Continued.*

deceased husband's land died without leaving heirs, whatever interest she had therein at once escheated to the state.

Croner v. Cowdrey, 139 N. Y. 471.

It seems that an escheat of lands to the state can only be enforced by its authority. *Id.*

Estoppel; *See Agency; Former Adjudication; Judgment; Partnership.*

I. BY DEED.

II. BY RECORD.

III. BY OFFICE OR POSITION.

IV. BY ACTS AND REPRESENTATIONS.

I. BY DEED.

A person who obtained land with right of way is not estopped from insisting upon such easement, although at the time of the granting the way was partially obstructed.

Haight v. Littlefield, 147 N. Y. 338.

The rule that estoppel differs from evidence, applied, in case of a deed.

Mut. Life Ins. Co. v. Corey, 135 N. Y. 326.

Where under the law there is an entire lack of power to do the act in question, it cannot be made good by estoppel. *Id.*

Where an estoppel relates to an interest in land, it passes with the land, and an estoppel by deed creates what in law is termed a title by estoppel. *Id.*

A warehouse company's liability for certificates issued by the president in his own name depends solely upon the authority of the president to issue such certificate.

Corn. Exchange Bk. v. American Dock & Trust Co., 149 N. Y. 174.

Where directors of the company have acquiesced in the issuance by the president of receipts in his own favor, they are estopped from denying the validity of such certificates in the hands of innocent purchaser.

Hanover Nat. Bk. v. American Dock & Trust Co., 148 N. Y. 612.

The validity of a mortgage may be contested by remaindermen who took no part in the contest, and did not consent to the execution of the mortgage by a temporary administrator.

Duryea v. Mackey, 151 N. Y. 204.

Although officers of a corporation entrust certificates to a servant before they are canceled, they are not estopped from challenging the validity of these certificates which were surrendered that others might be issued in their place.

Knox v. Eden Musee American Co., 148 N. Y. 441.

Estoppel—Continued.

Equity will not make an estoppel work any further than is reasonably and fairly within the intendment of the parties.

Geiler v. Littlefield, 148 N. Y. 603.

In an action by a judgment creditor to set a conveyance as to two pieces of property aside as fraudulent, a waiver as to one parcel will not, where the circumstances render an extension thereof inequitable, operate to prevent the maintenance of the action in relation to the other parcel. *Id.*

The Statute of Frauds is not an obstacle to the exercise by a court of equity of its jurisdiction to give effect to an equitable estoppel.

Thompson v. Simpson, 128 N. Y. 270.

When a party is concluded from denying his own acts or admissions which are expressly intended to influence the conduct of others. *Id.*

An estoppel may arise although there was no designed fraud. *Id.*

An estoppel may arise from silence. *Id.*

The owner of property which another person has assumed to convey is not precluded by mere silence from subsequently claiming it. *Id.*

Where the owner in such cases, knowing the facts, assents and accepts the proceeds of sale, he is estopped from asserting the legal title of the purchaser. *Id.*

The doctrine of equitable estoppel should be cautiously applied. *Id.*

II. BY RECORD.

The record of an action is not binding upon one not a party thereto. *Quimby v. Charhart*, 133 N. Y. 579.

A person is estopped by his testimony given in a former action.

Anthony v. Wise, 130 N. Y. 662.

When a judgment in favor of the landlord in summary proceedings for non-payment of rent is a bar to an action to cancel lease by tenant. *Cochran v. Reich*, 151 N. Y. 122.

Constructive notice from the record of a deed of the rights of the parties is not sufficient to impose an active duty.

Jenks v. Quinn, 137 N. Y. 223.

A judgment of a court of another state is not conclusive as to the ownership of a note not attached, but held by defendant in this state. *Ward v. Boyce*, 152 N. Y. 191.

A person who has obtained the removal of structures from bulkheads occupied by him, by *mandamus* proceedings, is not prevented from recovering wharfage in addition.

Flandreau v. Elsworth, 151 N. Y. 473.

The fact that a husband was a witness for his wife in an unsuccessful action brought by her to recover board, does not estop him from subsequently asserting an independent right to recover the same demand. *Stamp v. Franklin*, 144 N. Y. 607.

Estoppel—Continued.

Where defendant relies upon his possession as sufficient evidence of ownership of the land, an admission by his grantor that the title thereof is in plaintiffs does not bind defendants.

Greenleaf v. Brooklyn, Flatbush, etc., R. R. Co., 141 N. Y. 395.

The question of former adjudication, estoppel or bar is to be determined not only by the judgment alone, but also by the judgment roll.

Converse v. Sickles, 146 N. Y. 200.

A purchaser of a portion of real property under a sheriff's deed is not estopped by the conduct of the owner thereof in permitting his co-owner to execute a mortgage over the entire property, where he had no notice of the execution of such mortgage and was not made a party in foreclosure of it.

Lion v. Morgan, 143 N. Y. 505.

III. BY OFFICE OR POSITION.

Doctrine of estoppel applied where defendant, an administrator, had been induced to compromise with a debtor of the estate by the representations of the plaintiff that he had no claim against the estate but only against such debtor, and had distributed the moneys so received.

Stillings v. Haggerty, affirmed without opinion, 126 N. Y. 638.

Guardian signing, as such, a receipt for a sum paid him as compensation for lands of the ward taken by a city, is not estopped as against such ward from claiming an interest in the fund as tenant by the curtesy.

Matter of Camp, 126 N. Y. 377.

IV. BY ACTS AND REPRESENTATIONS.

A party may be estopped by his conduct.

Bishop v. Agricultural Ins. Co., 130 N. Y. 488.

The acts of an agent may estop his principal. *Id.*

Although an assignee completes a contract at the request of the creditor, which was partly finished before the assignment, there is not sufficient to estop the creditor from maintaining the action to set the assignment aside as fraudulent.

Groves v. Rice, 148 N. Y. 227.

A creditor, however, will be estopped where he procures the completion of the work in order that he may obtain the preference over other creditors. *Id.*

A company is estopped from denying its liability to indemnify a broker who made inquiries of the corporation, who informed him that the certificate was ready for transfer, which later proved fictitious.

Jarvis v. Manhattan Beach Co., 148 N. Y. 652.

A policy-holder, stating upon information the cost of the fire, is not estopped from later showing the facts of the difference.

White v. Royal Ins. Co., 149 N. Y. 485.

Estoppel—Continued.

One who has testified to a state of facts in favor of the successful party to a former action is not necessarily estopped thereby from asserting the contrary in an action in his own behalf against such party. *Knoch v. Von Bernuth*, 145 N. Y. 643.

Rule that to constitute an equitable estoppel there must have been some act or admission by the party sought to be estopped, inconsistent with his subsequent claim, and done or made with the intention of influencing the conduct of another, which he had reason to believe would, and which did, in fact, have that effect, and that silence will not estop unless there is a duty to speak, applied.

Knox v. Metropolitan Elevated R. R. Co., affirmed without opinion, 128 N. Y. 625.

A consignor interested with the consignee in goods shipped is not estopped from asserting his interest by the fact that he caused the bills of lading and invoices to be made to the order of the lienor. *Drexel v. Pease*, 133 N. Y. 129.

Mere silence may sometimes found an estoppel.

Collier v. Miller, 137 N. Y. 332.

When the holder of one of two mortgages, executed concurrently by the same mortgagor upon the same property, is not estopped from claiming a priority under a parol agreement. *Id.*

Eviction ; *See Landlord and Tenant.*

Evidence ; *See Criminal Law ; Practice ; Witness ; and for evidence in particular cases, see titles of actions.*

I. GENERALLY, COMPETENCY AND RELEVANCY.

II. JUDICIAL NOTICE.

III. RECORDS, JUDGMENT, DOCUMENTS AND WRITTEN INSTRUMENTS.

IV. PRESUMPTION.

V. BURDEN OF PROOF.

VI. BEST AND SECONDARY.

VII. ORDER AND WEIGHT.

VIII. PAROL TO VARY A WRITING.

IX. OPINIONS.

X. EXPERT TESTIMONY.

XI. HEARSAY.

XII. RES GESTÆ.

XIII. ADMISSIONS AND DECLARATIONS.

XIV. HANDWRITING.

XV. CIRCUMSTANTIAL.

XVI. PRACTICE.

Evidence—Continued.**I. GENERALLY, COMPETENCY AND RELEVANCY.**

Question on cross-examination, "When you wrote that letter did you intend they should understand that you were financially responsible?" was proper even if incompetent as affirmative matter, in action to recover goods brought by defendant's assignor.

Dobson v. Warner, affirmed without opinion, 128 N. Y. 649.
Evidence of collusion is admissible in an action to foreclose a corporate mortgage brought on request of a competing company.

Farmers' Loan & Trust Co. v. N. Y. & Northern R. Co., 150 N. Y. 410.

When it is incompetent to explain the words "mineral and ores."

Armstrong v. Lake Champlain Granite Co., 147 N. Y. 495.

When evidence may be introduced that use of the word "minerals" overrides the legal meaning of the word. *Id.*

Evidence in answer to the question "How much did you earn a week from" the defendants who employed the plaintiff injured in their service is competent on the question of damages in a suit against them for negligence.

Palmer v. Conant, affirmed without opinion, 128 N. Y. 577.

A certificate of death constituting part of the records of the board of health of a city is not competent evidence of the cause of death as between private parties.

Buffalo Loan & Trust, etc., Co., v. Knights Templar & Masonic Mut. Aid Asso., 126 N. Y. 450.

Evidence that the railroad company permitted brush to be cut along its line and left to dry, is competent on the question of its negligence in causing a fire.

Billings v. Fitchburgh R. R. Co., affirmed without opinion, 128 N. Y. 644.

It is not proper for an owner of real estate who does not collect the rents to testify as to the rents received.

Domschke v. Metropolitan El. R. Co., 148 N. Y. 337.

When mere production of a bond in suit by the defendant justifies a finding of non-payment.

Anderson v. Culver, 127 N. Y. 377.

Books of account may be introduced in evidence by judgment creditor to support an attack in equity upon a transfer of property by a judgment debtor by a third person claiming a valid debt as the consideration of the transfer.

White v. Benjamin, 150 N. Y. 258.

For what purpose a memorandum made by a witness cannot be admitted.

People v. McLaughlin, 150 N. Y. 365.

It is proper for the agent of an insurer to explain what he intended by ambiguous words.

Rickerson v. Hartford Fire Ins. Co., 149 N. Y. 307.

A non-expert witness in stating facts as to the actions of a party

Evidence—Continued.

- may testify whether such acts seem to him rational or otherwise. *People v. Strait*, 148 N. Y. 566.
- Statement by an attending physician as to diseases for which he treated an insured is admissible under section 834 of the Code. *Redmond v. Industrial Benefit Ass'n*, 150 N. Y. 167.
- A party calling one of the two physicians who attended him waives privilege by section 834 of the Code to object to the testimony of the other as to the transaction where both attended. *Morris v. N. Y. O. & W. R. R. Co.*, 148 N. Y. 88.
- A tenancy by the curtesy initiate in lands which the wife has the legal right to sell does not make the husband a person interested so as to render him incompetent under section 829 of the Code as a witness after the death of the wife in a suit to foreclose a mortgage even if he joined in the mortgage. *Albany County Savings Bk. v. McCarty*, 149 N. Y. 71.
- Evidence of a waiver of performance is admissible in an action upon a contract. *Thomson v. Poor*, 147 N. Y. 402.
- A husband may testify as to whether he received any part of the consideration in an action for breach of covenants in a deed of a wife's property in which he joined. *Mygatt v. Coe*, 147 N. Y. 456.
- Upon the hearing of a claim against the state based upon the negligent construction of a bridge, it is error to permit a witness to state that in his judgment the bridge was safe. *McDonald v. State*, 127 N. Y. 18.
- It is also error to permit an expert to state, on his judgment, a load of the size mentioned is an excessive load. *Id.*
- The books of account of a corporation are not competent evidence of themselves to establish an account or claim against a trustee. *Rudd v. Robinson*, 126 N. Y. 113.
- In an action for conversion defendant maintained that it was the agreement that he should retain the title till the lumber had been used to make boats for defendant, and plaintiffs, having proved a bill of the lumber sent by defendant, the latter offered to show by its agent who sent the bill that it was merely a memorandum of value, which offer was rejected, *held*, error. *Crosby v. Delaware & Hudson Canal Co.*, 128 N. Y. 641.
- A witness is not competent to testify as to the reputation of another until he was shown to have such knowledge. *Carlson v. Winterson*, 147 N. Y. 652.
- When it is not error to allow non-expert witness to state that defendant was rational. *People v. Youngs*, 151 N. Y. 210.
- What may be proved as justification in an action for slander. *Lampher v. Clark*, 149 N. Y. 472.
- A waiver in an application for insurance of the provision of section 834 of the Code is not against public policy. *Foley v. Royal Arcanum*, 151 N. Y. 196.

Evidence—Continued.

Elements of damages for diverting water from defendant's pond, considered. *Spencer v. Kilmer*, 151 N. Y. 390.

What is competent on the question of treble damages in an action of trespass. *Humes v. Proctor*, 151 N. Y. 520.

It is proper to prove tonnage of the hull of a vessel in an action to collect wharfage for an oyster barge.

Flandreau v. Ellsworth, 151 N. Y. 473.

A note of a decedent is not "testimony of a deceased person" within the meaning of section 829 of the Code, so as to permit testimony of the holder as to the consideration for such note.

Matter of Cullister, 153 N. Y. 294.

What does not authorize a defendant to testify that a note was a gift made by the decedent. *Rogers v. Rogers*, 153 N. Y. 343.

What will not authorize a defendant to testify in his own behalf as to his own transactions with the deceased. *Id.*

A surveyor who has indicated on a map the line surveyed by him, may also testify that the work was right.

La Rue v. Smith, 153 N. Y. 428.

Evidence of knowledge of insolvency by the officers of the bank at the time of the deposit of check and of similar knowledge on the part of officers of the transferee is competent.

Grant v. Walsh, 145 N. Y. 402.

Communications made to a friend, or to an attorney in the presence of a friend, are not privileged under section 835 of the Code.

People v. Buchanan, 145 N. Y. 1.

Though plaintiff presents but one of two charges to the jury the defendant may give evidence in justification of the other in mitigation of damages.

Holmes v. Jones, 147 N. Y. 59.

Evidence admissible in an action for the price of the goods actually delivered to show a waiver of full performance in accordance with the terms of the contract.

Brady v. Cassidy, 145 N. Y. 171.

When a person who has conducted first-class boarding-houses in the same city is competent to testify to value of services as housekeeper.

Edgecomb v. Buckhout, 146 N. Y. 332.

Where such services included sewing and mending, evidence of the value of such work is admissible. *Id.*

In an action of partition by heirs it is competent to show by parol evidence that a deed to one of them was an advancement.

Palmer v. Cullertson, 143 N. Y. 213.

Competent drawings of the scene of the homicide are admissible.

People v. Johnson, 140 N. Y. 350.

In an action for separation where husband sets up counter-claim for divorce, competent evidence of charge against him is admissible.

Woodrick v. Woodrick, 141 N. Y. 457.

Evidence tending to show testator's knowledge of the instrument executed is admissible.

Matter of Nelson, 141 N. Y. 152.

Evidence—Continued.

In an action on a contract that a press sold will take care of the pulp from four grinders of a specified make, where such grinders are not of uniform capacity, it is competent for the seller to show the represented capacity of the grinders to be used.

Bagley Sewall Co. v. Saranac River Pulp and Paper Co.,
135 N. Y. 626.

Evidence, *held*, competent on trial for arson as tending to prove that the fire was not accidental; that its origin was instigated by malice and not from the desire of gain.

People v. Murphey, 135 N. Y. 450

Upon the trial of an indictment for murder where self-defense was the plea, the reception of a photograph of the deceased to show his physical characteristic, is not error.

People v. Webster, 139 N. Y. 73.

Evidence to show bias in favor of the accused on the part of one of his principal witnesses, and to contradict her testimony on cross-examination as to statements previously made by her concerning her acts and habits, is properly admitted on question of credibility. *Id.*

The exclusion of evidence to show that the experiment was fraudulently conducted, was erroneously excluded though that fact was not alleged in the answer, since the test so conducted was part of the original fraud set up as defense of note.

Pelly v. Naylor, 139 N. Y. 598.

Where defendant, seeking to avoid an instrument, signed by him for fraud, has testified that he could not read, it is error to exclude further testimony by other witnesses to show his inability.

Page v. Krekey, 137 N. Y. 307.

In an action to enforce as a mortgage a deed absolute in form executed by husband and wife, it is competent for defendants to show that plaintiff had previously conveyed the same lands to the husband and also the wife.

House v. Lockwood, 137 N. Y. 259.

In an action for conversion, evidence on the part of the defendants that the property in question was brought in by judgment creditors at an execution sale, and the prices which they were able to realize thereon upon a sale shortly thereafter in an adjoining city, is competent on the question of value.

Parmenter v. Fitzpatrick, 135 N. Y. 190.

The rule admitting proof of the price which an article brings at a *bona fide* sale as some evidence of its value is not confined to sales at auction. *Id.*

Where the continuation of a contract is in dispute, a letter of one of the parties to that effect may be admitted.

Dexter v. Ivins, 133 N. Y. 551.

In an action to charge carriers as insurers, because of a deviation

Evidence—Continued.

from the route stipulated in the bill of lading, evidence of a usage to carry part of the way by railroad was competent.

Robertson v. Nat. Steamship Co., 139 N. Y. 416.

It is incumbent on the shipper to show his ignorance of the usage, and that knowledge imputed to his agent in transacting the business bound him. *Id.*

Where each party set up a different agreement, it is competent to prove the value of services.

Barney v. Fuller, 133 N. Y. 605.

Questions put to witness to test his memory are relevant.

People v. Tice, 131 N. Y. 651.

Questions tending to show motive are relevant. *Id.*

The existence in a locality of a certain usage may be proven.

Hammann v. Jordan, 129 N. Y. 61.

Evidence tending to prove duty of a railway to others than its passengers in a collision is improper.

Schneider v. Second Ave. R. R. Co., 133 N. Y. 583.

Evidence as to the reasonableness of a city ordinance may be given.

Mayor, etc., of New York v. Dry Dock, East Broadway, etc., R. R. Co., 133 N. Y. 104.

Proof of custom cannot be shown where specific orders for sale of stocks were given. *De Cordova v. Barnum*, 130 N. Y. 615.

Evidence showing an existing custom may be admitted.

Jarvis v. Brooklyn Elev. R. R. Co., 133 N. Y. 623.

Questions tending to show good faith are proper.

Hammann v. Jordan, 129 N. Y. 61.

Where there was an issue as to the date of a written receipt, it was competent for an expert in handwriting, after comparing the receipt with other writings, to state whether in his opinion the word in question was January or July.

Dresler v. Hard, 127 N. Y. 235.

In an action on a contract of employment, question whether defendants were dissatisfied with his statement to them was properly excluded.

Metz v. Luckemeyer, affirmed, *it seems*, without opinion in 128 N. Y. 682.

Evidence of an allegation not proven is incompetent.

Weed v. Hamburg-Brenan Fire Ins. Co., 133 N. Y. 394.

II. JUDICIAL NOTICE.

The nature and operation of the elevated railroads are so notorious that the courts may assume to be acquainted with them.

Bookman v. N. Y. Elevated R. R. Co., 137 N. Y. 302.

Courts may take judicial notice of the kind of locomotives in general use upon railroads.

Frace v. N. Y., Lake Erie, etc., R. R. Co., 143 N. Y. 182.

Evidence—Continued.

How the civil service regulations of the city may be proven.

People ex rel. Sears v. Toby, 153 N. Y. 281.

Judicial notice may be taken of the population of a city of the state.

Metz v. City of Brooklyn, affirmed, *it seems*, without opinion in 128 N. Y. 617.

Court will take judicial notice that a town named is in a particular county.

People v. Wood, 131 N. Y. 617.

Judicial notice will be taken of the population of political divisions within their jurisdiction.

People v. McKane, 143 N. Y. 455.

The court will take judicial notice of the provisions of chapter 769, Laws 1886, exempting the personal property of insurance companies from taxation.

People ex rel. Commercial Mutual Ins. Co. v. Tax Commissioners, 144 N. Y. 483.

The rule that parol evidence may be given as to the uniform, continuous and well-settled usage, and customs pertaining to the matters embraced in the contract, applied.

Atkinson v. Truesdell, 127 N. Y. 230.

III. RECORDS, JUDGMENTS, DOCUMENTS AND WRITTEN INSTRUMENTS; *See Foreign Judgments; Foreign Laws; Former Adjudication.*

In ejectment in which plaintiff claims to be the son of defendant's ancestor and seeks to prove a marriage between his mother and such ancestor prior to his birth, a judgment for damages recovered by the father of plaintiff's mother against the deceased is not admissible in evidence on the part of the defendants.

Eisenlord v. Clum, 126 N. Y. 552.

Although an admission contained in the first suit may be proved in behalf of the person bringing a subsequent action, that fact will not render the judgment in the first action admissible. *Id.*

The affixing of an internal revenue stamp is not essential to the validity of an assignment of an interest in real estate, when offered in evidence in the courts of this state.

Matter of Valentine, affirmed without opinion, 128 N. Y. 611.

Judgment recovered in a suit to restrain an elevated road from maintaining its operations except upon payment of specified damages is not admissible as to the value in condemnation proceedings subsequently taken.

Matter of Metropolitan Elevated R. R. Co., 128 N. Y. 600.

A judgment is admissible to prove so much as was decided by the issues.

Carleton v. Lombard, Ayres & Co., 149 N. Y. 137.

Evidence of a judgment may be received on a new trial where it is the foundation upon which a stipulation of the parties rests and tends to explain its purpose.

Hine v. New York El. R. R. Co., 149 N. Y. 154.

Evidence—Continued.

A surrogate's decree refusing the probate of a will is not *res adjudicata* between the parties in a subsequent action.

Corley v. McElmeel, 149 N. Y. 228.

It may be shown by the journals of the two houses that a bill was passed by a two-third vote.

New York & Long Island Bridge Co. v. Smith, 148 N. Y. 540.

Proof of the destruction of original draft of a public document, with proof of publication and of filing a copy duly signed, is sufficient to establish the existence of such document.

Board of Health of Yonkers v. Copcutt, 140 N. Y. 12.

Proof of a bond given by a grantee to the mortgagee, conditioned for the payment of any mortgage deed remaining after the remedy against the land is exhaustible, is admissible.

Wagner v. Link, 150 N. Y. 549.

An architect's certificate, although made after the commencement of an action, does not affect its admissibility in evidence.

Gillies v. Manhattan Beach Improvement Co., 147 N. Y. 420.

A continuance of a preceding title may be shown by a renewal lease.

Witmark v. New York El. R. R. Co., 149 N. Y. 393.

A former judgment establishing rights and relations between the parties thereto is admissible against a person not a party or privy for the purpose of proving that the plaintiff in the former action sustained to the defendant the relation established by such judgment.

Railroad Equipment Co. v. Blair, 145 N. Y. 607.

The record of a deed is not conclusive evidence of its delivery by the grantor to the grantee.

Townsend v. Rockham, 143 N. Y. 516.

Whether a statute of another state has altered the common law must be proved and not assumed.

Vanderpoel v. Gorman, 140 N. Y. 563.

In order to bar the admission of books of account upon trial of an indictment, objection should be made on ground that a person shall not be compelled to be a witness against himself.

People v. Spiegel, 143 N. Y. 107.

Where the books actually used are shown, evidence of what is generally used is incompetent.

Gillet v. Whiting, 141 N. Y. 71.

In an action to establish a copartnership between plaintiff and defendant, and for an accounting by the latter, a statement from the books, furnished by the bookkeeper employed by defendant, *held*, admissible against him.

Donovan v. Clark, 138 N. Y. 631.

Held, also, that though plaintiff put such entries in evidence, he might show that they were fictitious or foreign to the partnership.

Id.

Entries made in a party's books of account regarding property which has been pledged with him, which are undisclosed to

Evidence—Continued.

the pledgor and never assented to by him, have no more weight than the oral declarations of the party making them.

Griggs v. Day, 136 N. Y. 152.

Where a copy of the record of a foreign judgment sued on was presented with the authentication required by Code Civil Procedure (§ 952), the attestation of the clerk of the court was that they were true copies of the record filed and legally kept in the custody of the court, *held*, sufficient under section 957.

Dunstan v. Higgins, 138 N. Y. 70.

A foreign judgment sued on, being conclusive, *held*, that the facts stated in the answer were not admissible as proof upon the trial of the action on the judgment. *Id.*

A judgment roll wherein the person making the deposit had recovered the money from the sheriff is not admissible in another action against one, a party in both actions.

Blair v. Flack, 141 N. Y. 53.

A copy of an affidavit which has been used in court is admissible, though no proof exists that the original draft was signed. *Id.*

Where a judgment and certificate of amount due were not competent evidence against the state on claim for the amount certified but not paid. *Peck v. State*, 137 N. Y. 372.

In a proceeding before the Board of Claims it is error to permit the claimant to prove an award against the state in favor of one neither in law or estate privy with claimant for like damages.

Stone v. State of New York, 138 N. Y. 124.

The comptroller's deed upon a sale under a legislative enactment authorizing the sale of lands covered by a patent and in arrears of quitrents charged upon them, is *prima facie* evidence of the jurisdiction of the comptroller.

De Lancey v. Piepgras, 138 N. Y. 26.

Where plaintiff proceeds in an action for the recovery of royalties for the use of a patented device, the letters patent are competent evidence in behalf of the defendant.

Brusie v. Peck Bros. & Co., 135 N. Y. 622.

Books of account relating to cash transactions are not admissible.

Smith v. Rentz, 131 N. Y. 169.

Where an attorney, defendant in an action for blackmail, was permitted to prove that as such he brought a civil action against plaintiff, it is competent to put in evidence the complaint and bill of particulars to show good faith.

People v. Eichler, 142 N. Y. 642.

It is not erroneous to exclude evidence tending to show the defendant believed the complainant guilty of the crimes charged in a blackmailing letter. *Id.*

A written instrument, not witnessed nor acknowledged, declaring the signers were proprietors of land, is not sufficient evidence of title.

Sanger v. Merritt, 131 N. Y. 614.

Evidence—Continued.

Ancient leases, maps and writing may be admitted in evidence.

Dodge v. Gallatin, 130 N. Y. 117.

Recitals in an ancient deed are evidence that grantor and grantee made claim of title.

McRoberts v. Beyman, 132 N. Y. 73.

Where the power of a municipal board is determined in an action, such judgment is competent in a subsequent proceeding.

Ashton v. City of Rochester, 133 N. Y. 187.

The introduction in evidence of a city ordinance which prohibited the moving of a railroad train across the streets of a city faster than two miles an hour, before the enactment of Laws 1889, chapter 242, is proper.

Haywood v. N. Y. Central, etc., R. R. Co., affirmed without opinion, 128 N. Y. 596.

A map of lands is not competent evidence in an action of trespass.

Donohue v. Whitney, 133 N. Y. 178.

A map generally and publicly recognized to be correct is competent.

Id.

Map made from surveys taken under direction of grantor who conveys according to them are admissible.

Id.

Admission of certified copy of document filed in public office is not competent unless original is.

Id.

Entries testified to as correct by the party making them, who has no independent memory of the fact, may be admitted.

Nelson v. Mayor, etc., of N. Y., 131 N. Y. 4.

Statements made up from books by the person who made entries in the books are admissible.

Id.

Entries on the books of an old partnership are not admissible against one who becomes a member of a new partnership.

Kohler v. Lindenmeyr, 129 N. Y. 498.

The fact that the new firm continued to use the same books does not render the prior entries admissible against the new partner.

Id.

A judgment in partition is admissible where it is a link in plaintiff's chain of title.

Greenleaf v. Brooklyn, Flatbush & Coney Island R. R. Co., 132 N. Y. 408.

A judgment record in partition and deeds executed in pursuance thereof do not sufficiently establish a title in absence of proof of prior title.

Id.

IV. PRESUMPTION.

In the absence of any proofs outside of the records, it will be assumed that a former litigation involved everything alleged in the complaint.

Matter of Straut, 126 N. Y. 201.

A law of a foreign state, taken from a publication made under governmental authority, is entitled to be considered as the

Evidence—Continued.

existing law of the land in the absence of some equally good evidence that it has been changed or repealed.

Matter of Huss, 126 N. Y. 537.

Proof of the falling of a piece of iron from an elevated railroad, raises the presumption of negligence.

Hogan v. Manhattan R. Co., 149 N. Y. 23.

Legitimacy will be presumed, and the burden of proof rests upon those alleging illegitimacy; rule applied.

Matter of Seabury, 153 N. Y. 443.

It will be presumed that the commissioners of taxes and assessments have performed their duty.

People ex rel. Manhattan R. Co. v. Barker, 146 N. Y. 304.

In an action against the estate of a parent for services rendered under an express agreement to pay therefor, there is no presumption arising from the relationship of the parties against the existence of such a contract.

Ulrich v. Ulrich, 136 N. Y. 120.

Where a road was reduced in accordance with an act of the colonial legislature from a width of four rods to two, the presumption was that it afterward continued of the lesser width.

Blackman v. Riley, 138 N. Y. 318.

Acts indicating ownership and a claim of title for many years are not sufficient to authorize the presumption of a grant.

Mission of the Immaculate Virgin v. Cronin, 143 N. Y. 524.

The terms of a conveyance are presumed to be correct.

Oakes v. DeLanley, 133 N. Y. 227.

The owner of a lot is presumed to have a complete title thereto.

Hughes v. Met. Elevated Ry. Co., 130 N. Y. 14.

Presumption of title may be rebutted.

Id.

The burden of rebutting is on him who claims to have acquired the right.

Id.

Courts of general jurisdiction are presumed to have acted legally.

Hoag v. Town of Greenwich, 133 N. Y. 152.

When payment is, *prima facie*, presumed from lapse of time, the presumption thus raised has the same force and legal effect as evidence.

Martin v. Stoddard, 127 N. Y. 61.

A mortgage when time of payment is not shown on face is payable on demand.

Id.

The presumption of the continuance of lunacy is conclusive as to all dealings after the inquisition until it had been superseded.

Carter v. Beckwith, 128 N. Y. 312.

Proof that fire was not seen on the line of defendant's road before its train passed, and was seen there afterward, that there was no other passing at the time, that the weather was dry and that engines gave out sparks, sufficient to go to the jury on

Evidence—Continued.

the point, whether defendant's engines caused the fire complained of.

Billings v. Fitchburg R. R. Co., affirmed, *it seems*, with out opinion in 128 N. Y. 644.

The presumption against a state claim is one of fact and not of law. *Sheldon v. Sheldon*, 133 N. Y. 1.

Presumption of payment arises from production of instrument indicating payment. *Id.*

An agent is presumed to have no authority to pay his debts out of his principal's property.

Gerard v. McCormick, 130 N. Y. 261.

The presumption is that official acts are legally performed.

Rumsey v. N. Y. & New England R. R. Co., 130 N. Y. 88.

Presumptions may be overcome by production of sufficient evidence. *Id.*

The journal of a branch of the legislature may be looked to for the purpose of determining the vote upon a statute. *Id.*

Original law on file in office of secretary of state is conclusive. *Id.*

V. BURDEN OF PROOF.

The claim that property left to the wife of an heir is an advancement to him must be proved by satisfactory evidence.

Palmer v. Culbertson, 143 N. Y. 213.

The burden of proof is on the plaintiff in an action upon an accident policy, and a charge to the contrary is erroneous.

Whitlatch v. Fidelity & Casualty Co., 149 N. Y. 45.

Even though a plaintiff gives evidence of a consideration for the note, defendant is not relieved from the burden of showing want of consideration.

Durland v. Durland, 153 N. Y. 67.

When a plaintiff has the burden of showing that a running of the Statute of Limitations was suspended.

Mason v. Henry, 152 N. Y. 529.

The burden is upon the plaintiff to establish every fact material to his cause of action which is put in issue.

Farmers' Loan & Trust Co. v. Siefke, 144 N. Y. 354.

While a bailor charging negligence against the bailee where the goods have been injured by accident rests under the burden of proof, proof of the nature of the accident may afford *prima facie* proof of negligence and shift the burden upon the bailee.

Wintringham v. Hayes, 144 N. Y. 1.

The burden of proof is upon those who claim below high-water mark on navigable waters, under a grant of land.

DeLancey v. Piepgras, 138 N. Y. 26.

In a creditor's suit to avoid a prior judgment entered upon an

Evidence—Continued.

offer, the burden is upon the plaintiff to show that there was no indebtedness to sustain the claim.

Columbus Watch Co. v. Hodenpyl, 135 N. Y. 430.

He who asserts the lack of ability on the part of a grantor to execute a deed, the due execution of which is *prima facie* shown, must prove that lack of ability.

Jones v. Jones, 137 N. Y. 610.

Acts between partners, when relations are not fiduciary.

Smith v. Ogilvie, 127 N. Y. 143.

The burden of establishing the falsity of the statements complained of is on the party alleging their falsity.

Spencer v. Citizens' Mut. Life Ins. Assoc., 142 N. Y. 505.

Where a mortgage has been altered after execution and the alteration appears to be a material one, the burden is on plaintiff seeking to enforce it to show that it was made with the consent of the mortgagor.

Gleason v. Hamilton, 138 N. Y. 353.

An alleged change in a written instrument which makes the instrument perfect in accordance with its own express terms and apparent purposes, leaves nothing for the holder to explain, and the burden rests on the adversary to prove such an alteration.

Williamsburgh Savings Bk. v. Town of Solon, 136 N. Y. 465.

In an action to recover back money paid to relieve demand of an assessment for a local improvement apparently valid, but in fact illegal, the burden is on the plaintiff to show that the payment was made in ignorance of the facts making the assessment invalid, and where the evidence tends to establish lack of knowledge the question is for the jury.

Tripler v. Mayor, etc., N. Y., 139 N. Y. 1.

The burden of proof is on the party asserting the charge.

Matter of Strasburger, 132 N. Y. 128.

The burden of proving negligence in doing a lawful act is on the party seeking to establish it.

Allan v. State Steamship Co., 132 N. Y. 91.

This rule applied in an action against principal for unintentional error of servant.

Id.

Where defendant's evidence warrants a certain conclusion, burden of proof is on plaintiff.

Joy v. Dieffendorf, 130 N. Y. 6.

The burden of proving fraud is on party alleging it.

Kain v. Larkin, 131 N. Y. 300.

To set aside a deed on such grounds the evidence must be competent.

Id.

Where money has been given to a banker to loan in the ordinary way, upon his refusal to return it the burden of proving that it has been lost through no fault of his rests on him.

Isham v. Post, 141 N. Y. 100.

Evidence—Continued.

In an action against a bailee for negligence, the burden of establishing such negligence rests on the plaintiff.

Stewart v. Stone, 127 N. Y. 500.

Where the loss resulted from destruction of plaintiff's premises by fire, no presumption of negligence arises against defendant.

Id.

Where a defendant, sued as a general partner, denies the allegation and alleged that he was a special partner, in a limited partnership, burden of proof is on plaintiff.

Continental Nat. Bk. v. Strauss, 137 N. Y. 148.

When burden will be shifted to the defendant.

Id.

The burden of showing an omission of duty on the part of an employer, in establishing proper regulation defining the duty of employes and for the management of its business and in employing competent and sufficient servants, is upon a plaintiff suing for injuries.

Potter v. N. Y. Central, etc., R. R. Co., 136 N. Y. 77.

VI. BEST AND SECONDARY.

Usage as to the presentment of proof of death is inadmissible in behalf of a benefit society in an action for a death benefit.

Buffalo Loan, Trust, etc., Co. v. Knights Templar & Masonic Mut. Aid Asso., 126 N. Y. 450.

In proceedings to assess damages for water rights taken by a city, evidence of the amount paid to owners of other lands near the claimant is not admissible.

Matter of Thompson, 127 N. Y. 463.

In an action against a town for injuries it is error to permit the plaintiff under objection, to prove that, after the accident, guards to the approaches of the bridge were erected.

Getty v. Town of Hamlin, 127 N. Y. 636.

The police justice of Syracuse cannot give evidence as to the duties of his clerk, because they were specified by the statute.

People ex rel. Sears v. Toby, 153 N. Y. 381.

In an action of ejectment brought by grantee of property at a sheriff's sale, which was vacated, defendant may show that plaintiff was not a *bona fide* purchaser by proof that she was the mother of the plaintiff in a former action and that all their property was held in common.

Cottle v. Simmon, 153 N. Y. 403.

Admission of best evidence obtainable is not error.

Langdon v. Mayor, etc., of N. Y., 133 N. Y. 628.

Evidence having no bearing on the questions litigated is incompetent.

Dye v. Delaware, Lackawanna, etc., R. R. Co., 130 N. Y. 671.

Evidence of occurrence of similar accidents at other stations is not admissible for the purpose of charging defendant with notice of the dangerous character of the facilities provided by it, where

Evidence—Continued.

similar conditions at the other stations are not shown to be similar. *Brady v. Manhattan Ry. Co.*, 127 N. Y. 46.

Where defendant and his attorneys were notified in the course of the trial to produce a bill of sale the next day, upon their failure to produce it a copy was properly admitted in evidence.

Brokman v. Myers, affirmed, *it seems*, without opinion in 128 N. Y. 682.

VII. ORDER AND WEIGHT.

Dying declarations have not the same weight as direct evidence of a witness. *People v. Kraft*, 148 N. Y. 631.

Where the nature of the relationship between two defendant corporations, jointly sued, is peculiarly within their own knowledge and the evidence in their power and possession, the failure of one of them to produce such evidence will subject it to the result of possible unfavorable interferences by the jury.

Timlin v. Standard Oil Co., 126 N. Y. 514.

VIII. PAROL TO VARY WRITING.

When a bill of sale of a business contained, as consideration, a covenant to pay all the liabilities, parol evidence is inadmissible to show that real consideration was the payment of a sum less than the amount of the debts.

Brokman v. Myers, affirmed, *it seems*, without opinion in 128 N. Y. 682.

The rule that parol evidence cannot be given to contradict or vary a legal instrument does not apply to controversies between persons who are not parties to the instrument.

Hankinson v. Vantine, 152 N. Y. 20.

Where a written contract and bill of sale embodying the terms of the transaction drawn up at the plaintiff's suggestion at the time contained no reference to agreement not to engage in business, all the agreement between the parties was merged in the writing.

Costello v. Eddy, affirmed on opinion below, 128 N. Y. 650.

When validity of certain dispositions of personal property contained in the will are litigated, extrinsic evidence tending to show an intent on the part of the testator to create a trust in avoidance of the statute is not admissible.

Matter of Keleman, 126 N. Y. 73.

Parol evidence is admissible to prove the amount agreed in a memoranda of sale. *Emmett v. Penoyer*, 151 N. Y. 564.

Parol evidence is admissible that a note was delivered by maker to the bank with consideration upon an understanding that he would not be liable thereon.

Higgins v. Ridgeway, 153 N. Y. 130.

Evidence—Continued.

A provision in a contract for the sale of land that "said property shall be free and clear from all incumbrances and right of dower except an incumbrance of \$5,800 to be cleared at time of delivery of deed," is not ambiguous and cannot be varied by parol evidence. *House v. Walch*, 144 N. Y. 420.

In an action against a person as bailee of stock as security for performance of the conditions of a contract, evidence to show that he was the undisclosed principal is inadmissible.

Matter of Bateman, 145 N. Y. 623.

When the rule that parol evidence is inadmissible to vary a written instrument is waived. *Brady v. Nally*, 151 N. Y. 258.

It is not error to show by parol evidence that a person who made a contract was an agent and not a principal. *Id.*

The rule that a contract may be proved to have been delivered upon a parol condition applies to an instrument under seal not affecting real property. *Blewitt v. Boorum*, 142 N. Y. 357.

Parol evidence may be admitted to show the existence of a custom among merchantmen. *Iasigi v. Rosenstein*, 141 N. Y. 414.

Parol evidence is admissible to show the consideration for the execution of a mortgage. *Ferriss v. Hard*, 135 N. Y. 354.

It seems, however, that the consideration, while open to explanation, cannot be enlarged so as to extend the liability beyond that which the party has entered into in writing. *Id.*

Evidence of a conversation relating thereto cannot be given in an action upon a written instrument.

McCulloch v. Dolson, 133 N. Y. 114.

Oral testimony of a writing inadmissible where the writing can be produced. *Kain v. Larkin*, 131 N. Y. 300.

Where a former referee failed to produce vouchers of payments made, oral evidence of payment may be given.

Van Bokkelen v. Berdell, 130 N. Y. 141.

Parol evidence is not admissible to explain or limit the word "incompatibility" in a contract of employment.

Gray v. Shepard, 147 N. Y. 177.

Parol evidence is admissible only where the terms of a written guaranty are so ambiguous as not to indicate its meaning.

Henry McShane Co. v. Padian, 142 N. Y. 207.

When parol evidence may be given to bring a case within the exception which permits the introduction of parol evidence, for the purpose of completing an agreement of which the writing is but a part. *Thomas v. Scutt*, 127 N. Y. 133.

Where there is a contract appearing on its face to be complete, its effect cannot be limited by parol proof. *Id.*

The interest of insured may be shown by parol.

Cross v. Nat. Fire Ins. Co., 132 N. Y. 133.

Parol evidence may be admitted to explain local term.

Petrie v. Phoenix Ins. Co., 132 N. Y. 137.

Evidence—Continued.

Parol evidence may be used to ascertain the intent of parties where the terms of an instrument are vague and uncertain.

Harris v. Oakley, 130 N. Y. 1.

Parol evidence may be used to explain the terms of a written instrument.

Farr v. Nichols, 132 N. Y. 327.

What is necessary to bring a case within the rule admitting parol evidence to complete an entire agreement of which a writing is only a part.

Case v. Phoenix Bridge Co., 134 N. Y. 78.

When terms of a written contract for the construction of a portion of a pier cannot be changed by parol evidence on behalf of the contractor, that prior to the agreement the defendant agreed to lay the floor so that the contractor could complete the work within the specified time.

Id.

An oral agreement cannot be proved to defeat the terms of a deed.

Leonard v. Clough, 133 N. Y. 292.

Where the writing is collateral, parol evidence characterizing it is admissible.

Daniels v. Smith, 130 N. Y. 696.

Where the terms of a written statement are disputed, extraneous evidence may be brought in.

Miner v. Bawn, 131 N. Y. 677.

Unauthorized statements varying the terms of a written instrument are incompetent.

Quinlan v. Providence, Washington, Insurance Co., 133 N. Y. 356.

And this is so if the statements are made by an agent in course of his employment.

Id.

Where there is no ambiguity in the description in a deed, and every line can be surveyed on the ground just as it is given, and the grantor has the land, parol evidence is admissible to show that the parties did not intend to convey all embraced in the description.

Muldoon v. Deline, 135 N. Y. 150.

It seems that in an action to reform the deed for mistake, where all the parties are before the court, parol evidence might be given to show the mistake.

Id.

A party to a written instrument may make an oral agreement with one a stranger thereto.

Blazy v. McLean, 129 N. Y. 44.

Such later agreement does not contradict or vary the writing, but shows performance.

Id.

IX. OPINIONS.

A refusal to allow a hypothetical question, on the ground that one condition had not been proved, was proper.

People v. Tuzckewitz, 149 N. Y. 240.

When evidence of the mental condition of defendant at the time of trial may be introduced.

People v. Hoch, 150 N. Y. 291.

Evidence—Continued.

A physician may state his opinion as to the physical or mental condition of a person, though he does not state facts upon which he based his opinion, but merely examined the patient.

People v. Youngs, 150 N. Y. 210.

A physician, after testifying to his personal observation that an injury was received, and to the subsequent condition of the injured person, may give his opinion as to whether the injury was the cause of the condition.

Stouter v. Manhattan Ry. Co., 127 N. Y. 661.

The admission of direct testimony of the amount of depreciation in rental values was not prejudicial error, where the witness also gave the rental values before and after the road was built, and the difference was the amount of depreciation testified.

Moore v. New York Elevated R. R. Co., reversed on other grounds, 126 N. Y. 671.

Testimony of an expert as to what the present value of the abutting property would have been if the road were not in front of it, is incompetent evidence.

Roberts v. N. Y. Elevated R. R. Co., 128 N. Y. 455.

Upon what the opinion of an expert as to the value of property may be based. *Id.*

The present value of the property may be proved by expert evidence. *Id.*

It is generally safer to take the judgment of unskilled jurors than the opinion of hired experts. *Id.*

It is no answer to the objection to the erroneous admission of speculative testimony as to what the value of the property would have been without the road, that it is not prejudicial to defendant, because defendant is not bound to avail himself of the privilege granted it by taking a deed of the easement. *Id.*

Whether there would be any justification for the stoppage of the railroad,—*quære*. *Id.*

A physician may give an opinion as to the condition of the wound made by an instrument. *People v. Conroy*, 153 N. Y. 174.

Minutes of the grand jury are not common-law evidence as to what a witness testified to before them. *Id.*

A physician who has testified to the nature of the fractures of a leg may give his opinion as to the position of the leg at the time of the accident.

Johnson v. Steam Gauge and Lantern Co., 146 N. Y. 152.

An opinion of a medical expert as to whether the finger-nails of deceased were of sufficient length to have caused scratches on the face of the defendant charged with murder.

People v. Wright, 136 N. Y. 625.

It is proper to exclude the opinion of a witness as to what distance a conversation could be heard.

McLaughlin v. Webster, 141 N. Y. 76.

Evidence—Continued.

A witness may characterize as rational or irrational the acts of a person on trial under an indictment, whose acts and conversations he has detailed. *People v. Taylor*, 138 N. Y. 398.

Conclusions of a witness as to what was proved by former testimony inadmissible.

Kernochan v. New York Elevated R. R. Co., 130 N. Y. 651.
Opinion may be received in absence of objections to competency of witness. *Mitchell v. Met. Elevated Ry. Co.*, 132 N. Y. 552.

When question calling for opinion of witness is erroneous.

Jefferson v. N. Y. Elevated R. R. Co., 132 N. Y. 483.

A witness may testify as to whether the acts of a person were those of a rational or irrational man.

Paine v. Aldrich, 133 N. Y. 544.

An offer made for real property is not competent as to its value.

Hine v. Manhattan Ry. Co., 132 N. Y. 477.

It is improper to ask a physician, examined on behalf of the proponent of a will, and who has read the testimony of the contestant's witnesses, what, assuming such testimony to be true, his opinion would be as to the mental condition of testator.

Matter of Snelling, 136 N. Y. 515.

In such case it is necessary to propound a specific question covering all the facts or assumed facts. *Id.*

Opinion of witnesses as to rental value of land is competent.

Rumsey v. N. Y. & New England R. R. Co., 133 N. Y. 79.

Evidence of the effect of building a structure is competent. *Id.*

X. EXPERT TESTIMONY.

The lessee of a building, suing for breach of a covenant in the lease to rebuild, may, after testifying to the character and extent of his business, state the value of the lease for the time he would have been in possession. *Chamberlain v. Dunlop*, 126 N. Y. 45.

Testimony by a real estate expert in answer to the question, "What, in your judgment, would the property be worth without the elevated railroad?" is incompetent.

Doyle v. Manhattan Ry. Co., 128 N. Y. 488.

Evidence of the effect of such operations upon the premises in the vicinity even more exposed to damages than those in suit is competent. *Id.*

The court would not properly confine examination to particular premises in question. *Id.*

It was competent for either party to prove the general effect of the operation of the road upon the business of the street. *Id.*

The rule in *Sixth Avenue R. R. Co. v. Metropolitan Elevated Ry. Co.*, 56 Hun, 182, applied sustaining the admission of evidence as to the general course of rents in the immediate vicinity.

Sherwood v. Metropolitan Elevated R. R. Co., affirmed without opinion, 128 N. Y. 624.

Evidence—Continued.

Evidence of conversation of defendant with medical expert is competent. *People v. Nino*, 149 N. Y. 317.

It is not admissible in an action by an elevated railway company to prove the effect in diminishing values by the process of calling owners of property in the vicinity.

Jamieson v. Kings Co. El. R. R. Co., 147 N. Y. 322.

One who is not an expert may testify that a substance is blood.

People v. Burgess, 153 N. Y. 561.

In an action against an elevated railroad for damage to the fee of abutting property, expert testimony as to the value of plaintiff's property before the road was built and as to its present value is competent.

Sixth Avenue R. R. Co. v. Metropolitan El. Ry. Co., 138 N. Y. 548.

An expert witness cannot testify as to the mental condition of one whose acts have been stated to him only by a third party.

People v. Strait, 148 N. Y. 566.

Statement of a party as to his past conduct after the commencement of an action cannot be the basis of an opinion of an expert as to his mental condition. *Id.*

An expert witness should be confined to questions which contain in themselves the facts assumed to be proven, and upon which his opinion is desired. *Link v. Sheldon*, 136 N. Y. 1.

In an action against a physician for malpractice in treating a fracture it is proper to exclude his testimony in his own behalf as to the number of similar fractures he treated and the result. *Id.*

Hypothetical questions to expert witnesses must rest upon facts which are either admitted, or which, being in conflict on the evidence, the jury are to pass upon.

People v. Harris, 136 N. Y. 423.

In an action involving the question of the negligence of a bailee, testimony of an expert as to whether the injuries to the subject of the bailment were the result of ordinary wear and tear is competent. *Wintringham v. Hayes*, 144 N. Y. 1.

Evidence by experts, *held*, competent.

McCulloch v. Dolson, 133 N. Y. 114.

Samples of goods manufactured are not competent to prove condition of machinery. *Id.*

Proof that incompetent workmen were employed is also incompetent. *Id.*

XI. HEARSAY.

In an action for negligence against a railway company, statement of bystanders that the flagman did not attend to his business is inadmissible.

Felska v. N. Y. C. & H. R. R. R. Co., 152 N. Y. 339.

Evidence—Continued.

In the absence of disclaimer by defendant, evidence of plaintiff's good character may be given.

Stafford v. Morning Journal Association, 142 N. Y. 598.

XII. RES GESTÆ.

It is admissible to show fraudulent transactions approximate in time and similar in character in an action to set aside a sale of chattels on the ground of fraud.

Bauerlien v. O'Leary, 149 N. Y. 33.

Evidence as to the condition of other trees in a vicinity may be shown in an action for injury to trees by escaping gas.

Evans v. Keystone Gas. Co., 148 N. Y. 112.

Price paid by administrator a few days prior on a purchase of a similar interest at private sale is competent against him on the question of value of improvident sale.

Matter of Johnston, 144 N. Y. 563.

In slander it is competent on the question of damages to prove that the plaintiff has a family of young children who would be disgraced.

Enos v. Enos, 135 N. Y. 609.

In an action for slander it is permissible to prove, to show malice, a repetition by the defendant, before the commencement of the action, of the slander charged in the complaint.

Id.

In an action for conversion evidence of original cost of machinery is admissible.

Hanover v. Bell, 141 N. Y. 104.

On the question of negligence evidence that others had for a long time been deceived by the same printed statements is admissible.

Isham v. Post, 141 N. Y. 100.

In an action against a physician for malpractice, complaints of the plaintiff to the attending physician with a view to having him relieve the tight bandage, which was alleged to have caused the injury, is admissible.

Link v. Sheldon, 139 N. Y. 1.

Where goods have been obtained through false representations, evidence of similar representations made to others is admissible.

Bliss v. Sickles, 142 N. Y. 644.

Where proof of the actual rentals of plaintiff's property cannot be conveniently given in an action against an elevated railroad, its place may be supplied by proof of the depreciation in rental values of similar properties on the same street and of an increase in those of neighboring streets.

Cook v. New York El R. R. Co., 144 N. Y. 115.

Expert testimony is admissible in such an action to establish fee and rental values.

Id.

In an action for personal injuries declarations must have related to present and not past suffering.

Davidson v. Cornell, 132 N. Y. 228.

Statements to a physician of the effect and consequence of an injury are hearsay and not admissible.

Id.

Evidence—Continued.

Such evidence is not competent to corroborate plaintiff's testimony. *Id.*

Statements made to a physician for the purpose of treatment by him are allowable. *Id.*

Declarations by a party to others than medical attendant are not admissible. *Id.*

Such statements were admissible before enactment of the Code. *Id.*

Non-expert testimony as to involuntary exclamations of present pain are competent. *Id.*

It is erroneous to allow evidence of an insulting remark made after the injury was received to be proven as part of the *res gestæ*. *Butler v. Manhattan Ry. Co.*, 143 N. Y. 417.

XIII. ADMISSIONS AND DECLARATIONS.

Declarations of a deceased person as to his marriage are inadmissible as against his collateral by one claiming to be his son through such marriage, but are competent as hearsay evidence, in a case of pedigree. *Eisenlord v. Clum*, 126 N. Y. 552.

The exception regarding admission of hearsay evidence in case of pedigree is not confined to ancient facts. *Id.*

Proof of birth, marriage and death may be given by parol. *Id.*

It seems that the case is not necessarily one of pedigree because it may involve questions of birth, parentage, etc. *Id.*

The rule that the mere declarations of a prior holder of a chose in action cannot be given to affect the title of subsequent holder, does not apply when the declarations are made at the very time when the chose in action is negotiated to the person who is seeking to enforce it. *Benjamin v. Rogers*, 126 N. Y. 60.

In cases of rape statements made by the party, though not under oath, may be corroborated. *People v. Terwilliger*, 142 N. Y. 629.

A statement made by complainant the first time she met her mother is competent. *Id.*

When a memoranda of indebtedness found among testator's papers is competent as an admission against the estate.

Matter of Gallagher v. Estate of Brewster, 133 N. Y. 364.

The declarations of a testator, binding him, may be given in evidence against his personal representatives in all cases where they would have been competent against himself.

Hurlburt v. Hurlburt, 128 N. Y. 420.

Admissions of a guardian consisting of unnecessary statements in a proof of death presented in behalf of the ward, do not bind the latter and are not admissible against him.

Buffalo Loan, Trust, etc., Co. v. Knights Templar & Masonic Mut. Aid Asso., 126 N. Y. 450.

Admissions of the defendant that he wrote to the party without describing the letter are insufficient to authorize the introduction of a particular letter. *People v. Corey*, 148 N. Y. 476.

Evidence—Continued.

Statement of a deceased who was insured, in his application for insurance, is not falsified by statement of the physician as to cause of death. *Redmond v. Industrial Benefit Ass'n*, 150 N. Y. 167.

An admission of a party is evidence against him, unless explained away. *Raabe v. Squier*, 148 N. Y. 81.

Declarations of a confederate are admissible against the others. *People v. Peckens*, 153 N. Y. 576.

Evidence of similar transactions tending to show the existence of a scheme to defraud by similar devices to those practiced on complainant is admissible to show intent. *Id.*

Evidence of an admission by defendant as to an agreement made by him with a deceased person is not incompetent under section 829 of the Code. *Hirsh v. Auer*, 146 N. Y. 13.

A compromise agreement of a disputed claim which was not carried out is not admissible against the claimant in an action involving the question of the amount of such claim.

Tennant v. Dudley, 144 N. Y. 504.

Declarations by an attorney in regard to the rights of a mortgagor in a foreclosure suit are inadmissible.

Lewis v. Doane, 141 N. Y. 302.

The principal cannot be charged with liability upon statements made by an agent while engaged in his own personal business.

Bank of N. Y. Nat Banking Assoc. v. American Dock & Trust Co., 143 N. Y. 559.

The declarations of an agent are only admissible against his principal when made as a part of a transaction, undertaken in behalf of the principal or in the performance of the duties of his agency.

Manhattan Life Ins. Co. v. Forty-second St. & Grand St. Ferry R. R. Co., 139 N. Y. 146.

On the trial of an indictment for murder the declaration of a third person in the absence of the accused that "there would be a fight because he was jealous of the deceased," was admitted in evidence, is erroneous though not sufficient ground for reversal.

People v. Martell, 138 N. Y. 595.

Evidence of declarations and admissions by individual directors of a corporation who did not act for it in the transaction in question is not admissible against the corporation.

Merchants' Nat. Bk. v. Clark, 139 N. Y. 314.

Defendant's declarations when examined before the coroner are admissible on a subsequent trial for murder.

People v. Wright, 136 N. Y. 625.

Declarations of a deceased grantor, made subsequent to the execution of a deed, are not admissible to prove it was intended as a mortgage.

Jones v. Jones, 137 N. Y. 610.

Declarations in the interest of the party making them are excluded.

Brennan v. Hall, 131 N. Y. 160.

Evidence—Continued.

A written memorandum in an account book kept by an agent, to the effect that all loans in his name belonging to his principal have been paid and invested in the name of his principal, except one specified, is not, as an independent declaration, admissible in favor of the personal representatives of the person making it.

Doolittle v. Stone, 136 N. Y. 613.

Statements to a third person, not made contemporaneous with a transaction, are not competent.

Flannery v. Van Tassel, 131 N. Y. 639.

Declarations of an agent cannot bind the principal unless they are part of *res gestæ*.

Clapper v. Town of Waterford, 131 N. Y. 382.

The declarations of a party cannot be evidence in his behalf unless part of the *res gestæ*.

Enoch Morgan's Sons Co. v. Smith, 132 N. Y. 531.

The acts and declarations of conspirators in furtherance of their object are admissible.

People v. McKane, 143 N. Y. 455.

Immaterial declarations of a third party contained in a letter are admissible.

Thomas v. Gage, 141 N. Y. 506.

Where there is no duty to speak, silence is not an admission of the matters contained in the letter.

Id.

Declarations not part of the *res gestæ* are incompetent.

Kennedy v. Rochester City and Brighton R. R. Co.,
130 N. Y. 654.

Evidence of exclamations which are manifestations of pain are admissible.

Id.

Complaints which admit of deliberate design are inadmissible.

Id.

A mere statement by one conspirator, or any act done in pursuance of the conspiracy, is not evidence against his associate.

Id.

Declarations in relation to his title and against his interest made by a party since deceased while in possession are admissible against third persons.

Lyon v. Ricker, 141 N. Y. 225.

All that is required of circumstantial evidence in a criminal case is that there shall be positive proof of the facts from which the inference of guilt is to be drawn, and that that inference is the only one which can reasonably be drawn from those facts.

People v. Harris, 136 N. Y. 423.

Where it points irresistibly and exclusively to the commission by the defendant of the crime, a verdict of guilty may rest upon a surer basis than when rendered upon the testimony of eye-witnesses.

Id.

The declarations of a grantor after his grant are inadmissible as against his grantee in an action of ejectment against his grantor's heirs.

Williams v. Williams, 142 N. Y. 156.

The admission of the opinion of witnesses as to the value of land

Evidence—Continued.

after the erection of an underground crossing in the absence of specific judgment is not sufficient ground for reversal.

Beardsley v. Lehigh Valley R. R. Co., 142 N. Y. 173.

Where the title of a buyer of personal property who purchased in good faith is attacked as fraudulent by creditors of the seller, the declarations of the seller, when not a party, in the absence of the buyer, are not competent.

Flannery v. Van Tassel, 127 N. Y. 631.

XIV. HANDWRITING.

For the purpose of comparing handwritings it is proper only to admit such writing which was proved to be genuine.

People v. Corey, 148 N. Y. 476.

It must be shown that the witness is acquainted with the handwriting in question before he be permitted to testify as to whether an instrument is genuine or not. *Id.*

Where a signature is disputed, other genuine signatures may be proven. *Mutual Life Ins. Co. v. Sinter*, 131 N. Y. 557.

XV. CIRCUMSTANTIAL.

On trial of an indictment for murder what evidence of defendant's relations with other women are not admissible.

People v. Strait, 148 N. Y. 566.

Forged checks found on the person of defendant are admissible on the trial of the indictment for forgery.

People v. Altman, 147 N. Y. 473.

It may be shown that the erasures and alterations of the numbers on stolen goods were made in order to prove identity.

People v. Schooley, 149 N. Y. 99.

Evidence of receiving other goods stolen at the same time is admissible on the trial of indictment for receiving stolen goods.

People v. McClure, 148 N. Y. 95.

When a will made by the wife prior to the marriage, giving her property to her husband, is admissible on the question of motive.

People v. Buchanan, 145 N. Y. 1.

A deed made by the wife to defendant after marriage and his conveyance of the property are admissible. *Id.*

Declarations of defendant showing hostile feelings toward his wife are relevant on the question of motive. *Id.*

Where the prosecution on a trial for an attempt to extort money has given evidence of prior intimacy between the defendant and complainant, it is error to exclude evidence to show that in his relations with the complainant the defendant was acting under the direction of the Society for the Prevention of Crime.

People v. Gardner, 144 N. Y. 119.

Guilt of one of several defendants, who are jointly indicted for a felony, must be established by evidence showing that acts of

Evidence—Continued.

the others were done at times when the proofs in the case permit of a belief that a conspiracy existed.

People v. Kief, 126 N. Y. 661.

Under Penal Code, section 29, the record of one who is acquitted is not competent evidence upon the trial of the latter, though both are jointly indicted as principals. *Id.*

Conduct of the wife after the homicide, that she did not exhibit the proper feeling of sorrow, is inadmissible as the means of impeaching her evidence as a witness for the defendant upon his trial for murder. *People v. Wood*, 126 N. Y. 249.

It is proper to prove communications made to defendant by his wife a week before homicide and the injury done to her by deceased for the purpose of showing the effect it had on defendant's mind. *Id.*

Such evidence is admissible on the ground that it is more or less corroborative of defendant's claim as to his mental condition. *Id.*

Nor is such evidence rendered inadmissible by the fact that the act with which defendant is charged seems to have been committed deliberately. *Id.*

Testimony that murdered man said "There go the burglars," is admissible as bearing upon the opportunity the suspected men had to enter an agreement to resist arrest.

People v. Wilson, 145 N. Y. 628.

Evidence that the suspected persons were brothers is also admissible as bearing on the issue of agreement between them to effect escape together. *Id.*

Facts competent on the question of premeditation and deliberation. *People v. Scott*, 153 N. Y. 24.

What may be proof on a trial for murder in the first degree to establish motive. *Id.*

What is competent on the question of intent and deliberation.

People v. Shea, 147 N. Y. 78.

Testimony which explains the conduct of an officer killed in making an arrest is admissible. *People v. Wilson*, 141 N. Y. 185.

Where an explosion in a powder mill was alleged to have been caused by sparks from a passing engine, and the evidence though circumstantial is strong enough, such allegation will be deemed proven.

Babcock v. Fitchburgh R. R. Co., 140 N. Y. 308.

Evidence may be given of acts which indicate the power and influence of one charged with procuring others to violate the law.

People v. McKane, 143 N. Y. 455.

Where defendant participates in the arrangement of election districts, he is competent to show how they are arranged. *Id.*

Proof of good character may be subject to cross-examination.

Id.

Evidence—Continued.

Evidence of declarations of persons when applied to for inspection of registry lists is part of *res gestæ*. *Id.*

Exceptions to rulings which do not affect substantial rights may be disregarded. *Id.*

Mere probability is not enough to sustain a conviction for crime based upon circumstantial evidence.

People v. Wright, 136 N. Y. 625.

What evidence is admissible on subject of motive upon trial of an indictment for the obtaining of an indorsement on a note by false pretenses with intent to defraud the indorser.

People v. Cole, affirmed without opinion, 137 N. Y. 531.

Under an indictment for killing defendant's wife, evidence of the relations between her and a man whom he found and killed with her, known to him at the time, was admitted in his behalf. *Held*, that the exclusion of facts of which he was ignorant was proper.

People v. Osmond, 138 N. Y. 80.

Upon the trial of an indictment for murder by a convict, evidence that after the act other convicts attempted to subdue the defendant and one was killed by him, was properly admitted.

People v. Johnson, 139 N. Y. 358.

The admission of evidence that the accused stabbed a companion of the deceased after the offense for which he was indicted is not error.

People v. Pallister, 138 N. Y. 601.

In an action against a railroad company by a brakeman injured by a defective brake where he claimed a proper inspection would have caused the defect to have been discovered, the rejection of evidence to show that other brakes on cars of the road were defective was erroneous.

Baily v. Rome, Watertown, etc., R. R. Co., 139 N. Y. 302.

Evidence describing the scene and circumstances of an occurrence are competent.

People v. Cassidy, 133 N. Y. 612.

Map defining precise location of a house attempted to be fired is competent. *Id.*

Conviction may be had upon confessions voluntarily made. *Id.*

A letter written while under arrest, indicating guilt, is competent. *Id.*

Acts and conduct showing conspiracy are admissible.

People v. Sherman, 133 N. Y. 349.

Where the terms of a will are doubtful, evidence of circumstances surrounding its execution is admissible.

Morris v. Sickly, 133 N. Y. 456.

When evidence merely to show previous bad and vicious character becomes admissible.

People v. Harris, 136 N. Y. 423.

The rule that evidence in criminal cases should be confined strictly to the question in issue is not infringed upon, because the evidence offered, while tending to prove some essential fact

Evidence—Continued.

in the guilt of the accused, may also prove the commission of another offense. *Id.*

Where strange conduct of the accused has been proven, evidence of his intoxication may be proven.

People v. Miles, 143 N. Y. 383.

XVI. PRACTICE.

Question, "Is there any form of insanity where the mind as fits comes and then there is a blank, and it goes?" to which medical expert answered: "I do not know of any such form," was proper. *People v. Osmond*, 138 N. Y. 80.

A *prima facie* case of conspiracy and of defendant's connection with it must be made out before acts in furtherance of it can be proved. *Brackett v. Griswold*, affirmed, 128 N. Y. 644.

Where a witness is unable to distinctly recollect the fact of an original entry made by him at the time of the transaction is admissible as an auxiliary to his testimony.

People v. McLaughlin, 150 N. Y. 365.

It may be shown by photograph the premises where the homicide took place. *People v. Pustolka*, 149 N. Y. 570.

It is admissible to prove that manufacturer knew the destination of the goods and question of his liability for latent defects rendering the goods unfit for transportation.

Carleton v. Lombard, Ayres & Co., 149 N. Y. 137.

When an offer of proof made for the purpose of impeaching a witness may be excluded unless clear and embracing the elements of a contradictory. *People v. Youngs*, 151 N. Y. 210.

Where defendant has shown that plaintiff and her daughter held their property in common, plaintiff should be permitted to show that the property which was the subject of the former action is owned solely by the daughter. *Id.*

Letter written by one of the plaintiff's assignors to defendant, and assuming to characterize the nature of previous acts of the defendant, in a case where the intent of the defendant in the acts referred to is in issue, is material error.

Bank of British N. A. v. Delafield, 126 N. Y. 410.

The proof against objection of a letter containing an offer of compromise of a pending action is sufficient for reversal.

Smith v. Satterlee, 130 N. Y. 677.

Immaterial evidence calculated to prejudice the jury upon a trial for homicide is inadmissible.

People v. Larubia, 140 N. Y. 87.

Evidence of statements made by third parties, not assented to by defendant, is inadmissible. *Id.*

On the trial of an action against a railroad company for negligence to brakeman struck by a bridge while on one of the company's trains, the exclusion of evidence to show the usual

Evidence—*Continued*.

distance of tell-tale signals from railroad bridges offered on behalf of plaintiff was erroneous.

Wallace v. Central Vermont R. R. Co., 138 N. Y. 302.

In an action by an abutting owner to recover damages when plaintiff was permitted, against defendant's objection, to prove the effect of the operation of the road on the premises upon the corner opposite to that upon which her premises were situated but defendant was prohibited from giving similar evidence, the exclusion of defendant's evidence was error.

Doyle v. Manhattan Ry. Co., 128 N. Y. 488.

Admission of evidence tending to establish wrong measure of damages is error.

Barnes v. Keene, 132 N. Y. 13.

Judgment not reversed upon barely competent opinion of expert where no harm is done by such opinion.

O'Neil v. Dry Dock, East Broadway, etc., R. R. Co., 129 N. Y. 125.

Examination of Parties ; *See Practice ; Witness.***Excavations** ; *See Municipal Corporations.*

When made with consent of proper authorities, the person is held to ordinary liability.

Babbage v. Powers, 130 N. Y. 281.

The license relieves the party from liability as for trespass, upon compliance with conditions.

Id.

An oral license is sufficient.

Id.

Consent on part of the city is to be inferred from knowledge of authorities.

Id.

Where no license has been obtained a higher degree of liability is imposed.

Id.

Exceptions ; *See Evidence ; Practice ; Surrogate's Court.*

A general exception to findings is not sufficient to raise specific objections on appeal.

Magovern v. Robertson, affirmed without opinion, 127 N. Y. 691.

An exception to a finding should state specifically the ground of error relieved on.

Hunter v. Manhattan Ry. Co., 141 N. Y. 281.

Where there were many requests to charge on both sides, some of which were granted and some refused, an exception "to the granting of the requests on the other side, and a refusal to charge those of mine that were not charged," presents no question for review in the Court of Appeals.

Huerzeler v. Central Cross-Town R. R. Co., 139 N. Y. 490.

An exception in term to referee's conclusion of law, required by finding of fact on which it is based, is not available on appeal.

Daniels v. Smith, 130 N. Y. 696.

Exceptions—Continued.

When not sufficiently definite and specific not available. *Id.*

A finding of fact not properly excepted to presents no question for review. *Id.*

Where the trial court directs a verdict in favor of defendant, an exception to the direction of the verdict is necessary in order to enable plaintiff to appeal.

Curtis v. Wheeler & Wilson Mfg. Co., 141 N. Y. 151.

Excise ; See Civil Damage Act ; Clubs ; Liquor Tax Law.

Board may use its discretion in granting license.

People ex rel. O'Toole v. Board of Excise of Brooklyn, 133 N. Y. 683.

Each sale of liquor without a license is a separate offense.

People v. Sinell, 131 N. Y. 591.

License cannot be revoked without due process.

People ex rel. Silkens v. McGlyn, 131 N. Y. 602.

Failure to perform duty renders commissioners liable to indictment.

People v. Meaken, 133 N. Y. 214.

The fact that a fine might have been imposed will not prevent indictment. *Id.*

Power to grant licenses under section 43 of the Excise Law as amended in 1893, considered.

People ex rel. Cairns v. Murray, 148 N. Y. 171.

When a building is exclusively for schoolhouse, although occupied by teachers. *Id.*

What was not a sale within the meaning of the Excise Law.

People v. Adelphi Club, 149 N. Y. 5.

What is insufficient to sustain a conviction for selling liquor on Sunday.

People v. Owens, 148 N. Y. 648.

Execution and Supplementary Proceedings ; See Arrest ; Attachment ; Redemption.

I. AGAINST THE PERSON.

II. AGAINST PROPERTY.

III. SALE.

IV. SUPPLEMENTARY PROCEEDINGS.

I. AGAINST THE PERSON.

A body execution may be issued under section 3026 of the Code by one who assigns wages and fails to pay same to assignee.

Farrelly v. Hubbard, 148 N. Y. 592.

The provisions of Code Civil Procedure (§§ 1731, 1825, 1826), relating to execution against executors, do not apply in the case of judgment against a partnership, consisting of a survivor and executors of the deceased partner.

Columbus Watch Co. v. Hoydenpyl, 135 N. Y. 430.

Execution and Supplementary Proceedings—*Continued.*

When action at law will not lie in behalf of an execution creditor of an insolvent corporation to recover the amount of his claim against a prior judgment creditor when the defendant's judgment was entered upon an offer in violation of the statute and in fraud of creditors.

Braem v. Merchants' Nat. Bk., 127 N. Y. 508.

The proceeds received by fraudulent vendee on sale by him of property are the subject of equitable jurisdiction only. *Id.*

II. AGAINST PROPERTY.

When upon authorized execution a levy is void as against an attachment levied by a creditor prior to confession of judgment, considered.

Galle v. Todd, 148 N. Y. 270.

The withdrawal of an execution prior to the sale does not affect the lien of the attachment issued.

Van Camp v. Searle, 147 N. Y. 150.

An execution issued on the day of but after the death of the judgment debtor, without notice to his legal representatives or permission of the surrogate, is absolutely void.

Prentiss v. Bowden, 145 N. Y. 342.

Personal property willed to several legatees is subject to levy against all.

Baskin v. Hays, affirmed without opinion, 128 N. Y. 631.

A judgment creditor may sell, under execution, lands fraudulently conveyed by the debtor prior to the entry of the judgment without first obtaining a decree adjudging such conveyance to be void.

Smith v. Reid, 134 N. Y. 568.

It seems, however, that the fraudulent grantor may convey a good title to a *bona fide* purchaser, and such conveyance would destroy the lien of the judgment. *Id.*

A subsequent purchaser from the fraudulent grantee cannot claim *bona fides*, where at the time of his purchase the execution purchaser was in possession, claiming title under the sheriff's deed. *Id.*

III. SALE.

Construction of Code Civil Procedure (§ 1410), as amended by Laws 1881, chapter 681, concerning sales of real estate on execution of title.

Gilman v. Tucker, 128 N. Y. 190.

In order to defend a sale upon execution it is necessary to show a levy and actual possession of goods.

Stonebridge v. Perkins, 141 N. Y. 1.

Execution and sale under a void judgment will not affect the right to convey by purchaser.

McCracken v. Flanagan, 141 N. Y. 174.

Notice to the grantee of defendant of purchaser's claim at the

Execution and Supplementary Proceedings—Continued.

execution sale will not estop him from asserting its invalidity. *Id.*

A sheriff who has advertised a sale cannot sell, under that notice, on an execution received after publication was commenced.

Van Camp v. Searle, 147 N. Y. 150.

IV. SUPPLEMENTARY PROCEEDINGS.

A party by executing a recognizance consents to entry of judgment in case of forfeiture, which is equivalent to an appearance within the meaning of section 2458 of the Code, and supplementary proceedings may be had.

People v. Cowan, 146 N. Y. 348.

An execution issued more than ten years after the judgment was recovered cannot be made the basis of supplementary proceedings.

Importers & Traders' Nat. Bk. v. Quackenbush, 144 N. Y. 651.

When a judgment creditor cannot maintain supplementary proceedings.

Importers & Traders' Nat. Bk. v. Quackenbush, 143 N. Y. 567.

A compliance with the provisions of section 1252 of the Code does not authorize such proceedings as the execution required, as the basis thereof is not that prescribed by such section, but by section 2458. *Id.*

Supplementary proceedings may be maintained against a foreign corporation having no business or agency in this state.

Logan v. McCall Publishing Co., 140 N. Y. 447.

Executors and Administrators; See Decedents' Estates; Definitions; Surrogates' Courts; Trustees; Wills.

I. GENERALLY.

II. ASSETS.

III. RIGHTS AND POWERS.

IV. DUTIES AND LIABILITIES.

V. SUITS BY AND AGAINST.

VI. PAYMENT OF DEBTS AND LEGACIES.

VII. SALE OF REAL PROPERTY TO PAY DEBTS.

VIII. ACCOUNTING AND FEES.

IX. TRUSTS.

I. GENERALLY.

An order appointing the next of kin first entitled, administratrix of the estate of an intestate is not void so as to defeat the

Executors and Administrators—Continued.

remedy upon the administratrix's bond, by the fact that previous letter had been granted to the public administrator.

Power v. Speckham, 126 N. Y. 354.

Such administratrix may, upon her letters becoming revoked by the probate of a subsequently discovered will, be directed by the surrogate to pay over to the executor of the decedent any funds in her hands. *Id.*

Administrator, also sole next of kin, held corporate stock of intestate, but without having it transferred on the books of the corporation before judicial settlement of his accounts, insufficient to justify treating him individually as owner of the stock.

Matter of Bingham, 127 N. Y. 296.

Code Civil Procedure (§ 2699) was intended to give a discretion to modify the general rule prescribed by section 2667, in case adequate security had already been given or waived, or where only the security of domestic creditors was involved.

Matter of Prout, 128 N. Y. 70.

The reversal on appeal of a prior decree, judgment not having been entered, *held*, no answer to an application for a final accounting by an executor.

Matter of Reeves, affirmed, *it seems*, without opinion, 128 N. Y. 612.

A surrogate has no power on an accounting to set aside on the ground of fraud an assignment to the executor of a share in the estate.

Matter of Randall, 152 N. Y. 508.

A judicial settlement of administrators is conclusive upon the sureties upon their bonds.

Altman v. Hofeller, 152 N. Y. 498.

An unrevoked order granting letters of administration is not conclusive upon next of kin who were not cited so as to estop them from attacking a decree of distribution.

Matter of Patterson, 146 N. Y. 327.

Upon death of owner the title to realty vests in his heirs and devisees.

Kingsland v. Murray, 133 N. Y. 170.

Where sufficient personalty remains, the realty cannot be sold to pay debts. *Id.*

Personal representatives are liable to creditors for misuse of personalty. *Id.*

II. ASSETS.

Where the mortgaged premises are bought in by the administrator at sale in foreclosure of mortgage of decedent, they are to be regarded as personalty.

Haberman v. Baker, 128 N. Y. 253.

Neither the heirs of the decedent nor the residuary devisee need join in the conveyances in order to pass good title. *Id.*

Upon the execution of a contract for the sale of land and prior

Executors and Administrators—Continued.

to a default on the part of the purchaser, there is an equitable conversion of the land, and where the vendor dies before the time of completion of the contract, in such case the proceeds pass to his executors as personalty.

Williams v. Haddock, 145 N. Y. 144.

The inventory and appraisal are *prima facie* evidence of the extent and value of the assets. *Matter of Mullan*, 145 N. Y. 98.

Where ownership by decedent of certain bonds is not proved, a written statement left by him that plaintiff owns them is sufficient to establish plaintiff's title.

Govin v. DeMeranda, 140 N. Y. 474.

Growing grass at time of testator's death goes to the devisee.

Matter of Chamberlain, 140 N. Y. 390.

Where executor, who is also life tenant, receives part of the proceeds upon sale of such grass, it will be regarded as rent received by the life tenant. *Id.*

Damages recoverable for causing death of decedent are not general assets. *Stuber v. McEntee*, 142 N. Y. 200.

III. RIGHTS AND POWERS.

A power vested in executors who consent to act or may survive, vests in sole survivor. *Veele v. Keeler*, 129 N. Y. 190.

A temporary administrator has no authority to mortgage real estate. *Duryea v. Mackey*, 151 N. Y. 204.

Even consent of the attorneys will not give surrogate power to authorize temporary administrator to mortgage real estate. *Id.*

The executor of one entitled to a legacy has a right to receive it for the purpose of administration.

Matter of Murphey, 144 N. Y. 557.

The executors of a vendor of real estate who dies before the time for completion of the contract have power to extend the time for completion by the purchaser.

Williams v. Haddock, 145 N. Y. 144.

An administrator may purchase real estate at a foreclosure sale.

Matter of Monroe, 142 N. Y. 484.

An administrator will not be removed for foreclosing mortgages held by him personally, and purchasing the same. *Id.*

Proof that an agent having authority to draw checks did so while his principal was dying, at the request of a messenger from the house of the latter and on his assurance that it was all right, is insufficient to show that the drawing of such checks was authorized. *Matter of James*, 146 N. Y. 78.

Where the will creates no trust, a fund contributed by the heirs to produce an annuity given by the will is held by the executor as agent of such heirs. *Matter of Collins*, 144 N. Y. 522.

Where the executor's petition for an accounting states that cer-

Executors and Administrators—Continued.

tain payments were made to a person as legatee, he cannot claim they were made to such person as co-executor.

Matter of Lang, 144 N. Y. 275.

Where a will empowers the executors to sell the real estate when in their judgment they deem it for the best interests of the estate, they are entitled to reimburse themselves from the proceeds of such sale for debts paid by them.

Matter of Bolton, 146 N. Y. 257.

One of several executors may sell the interest of his testator in a firm to the surviving partners who also are executors.

Geyer v. Snyder, 140 N. Y. 394.

Upon the accounting of the representatives of a deceased executor, the surviving executrix has no official interest.

Matter of Hodgman, 140 N. Y. 421.

Administrator with the will annexed is entitled to the residuary estate upon the settlement of the personal accounts of a deceased executor.

Matter of McDougall, 141 N. Y. 21.

The unliquidated commissions of an executor are not assignable.

Matter of Worthington, 141 N. Y. 9.

Under Code Civil Procedure (§ 2472), the surrogate may, upon the presentation of a petition by an administrator asking to be discharged upon making payments pursuant to a decree in proceedings for a final accounting then pending, and that objections then filed be overruled, permit the filing of an answer by the next of kin and a hearing on the issues made thereupon.

Matter of Cornell, 137 N. Y. 600.

An executor as such takes unqualified legal title of all personalty not specifically bequeathed, and a qualified legal title to that bequeathed.

Blood v. Kane, 130 N. Y. 514.

He holds for benefit of creditors and those entitled to distribution.

Id.

The trust estate of a sole legatee and devisee, after payment of creditors, becomes his legal vested estate.

Id.

Such executor, on proof that all the debts of the testator have been paid, may avail himself of a demand due the estate as a counter-claim in an action against him.

Id.

Where no notice to present claims had been published, but defendant testified that the debts had been paid, it is error to exclude proof of counter-claim.

Id.

IV. DUTIES AND LIABILITIES.

Receipt by an administrator who had been discharged of his trust of the proceeds of property of the estate sold thereafter, *held*, to make him personally responsible for the money when deposited in a bank which subsequently failed.

Harlow v. Mills, affirmed without opinion, 128 N. Y. 650.

The executor of a deceased lessor is bound to carry out his testa-

Executors and Administrators—Continued.

tor's covenant to rebuild in case of the destruction by fire of the demised premises. *Chamberlain v. Dunlop*, 126 N. Y. 45.
Case where reconveyance of land made to executrix individually, the fact that she did not sign the bond in her official character does not render the mortgages void.

Roarty v. McDermott, 146 N. Y. 296.

An executor or administrator who, being also the residuary legatee, in good faith applies to his own use the assets remaining after paying legacies and all claims presented in the usual course, cannot be held accountable except for the actual value of the assets or be charged with the profits of a business into which he puts them.

Matter of Mullon, 145 N. Y. 98.

Where it is sought to hold an administrator liable for having made an improvident sale of an interest in leasehold property, evidence of the price paid by him a few days prior thereto on a purchase of a similar interest at private sale is competent.

Matter of Johnston, 144 N. Y. 563.

Where an administrator as such transfers a mortgage and receives back an assignment thereof, said assignment is voidable.

Reed v. Knell, 143 N. Y. 484.

Payment of legacies unreasonably delayed may be ordered by surrogate.

Matter of Scheidelar, 142 N. Y. 668.

Executors are not liable to a judgment creditor having an interest in land sold under a power of sale.

Sayles v. Best, 140 N. Y. 368.

Where the surrogate in assessment proceedings, under section 13 of the Collateral Inheritance Act, determined that certain legacies were exempt from the tax, such adjudication was a complete bar to subsequent proceedings by the district attorney against the executors, under section 16 and section 17 of said act.

Matter of Wolfe, 137 N. Y. 205.

An executor is liable on accounting for use of trust funds and for interest thereon.

Matter of Myers, 131 N. Y. 409.

Liability of trustees for use of money is not affected by pendency of action for revocation of probate.

Id.

Investment of trust funds in a firm renders executors chargeable with interest.

Id.

Purchase of property by one of the executors who were tenants in common does not make them chargeable as trustees.

Carpenter v. Carpenter, 131 N. Y. 101.

The provisions of Code Civil Procedure (§ 2610), that the article in which that section occurs shall not affect the liability of sureties in a bond executed before the enactment of the chapter, does not refer to the remedy provided for enforcing such liability, and, by section 2606, is applicable in an action brought against the sureties.

Potter v. Ogden, 136 N. Y. 384.

When such default is properly established by a decree against the

Executors and Administrators—Continued.

- successor in administration of the deceased administrator who furnished the bond in question, considered. *Id.*
- The sureties upon an administrator's bond remain liable to next of kin until they can show lawful payment to parties legally entitled to receive it. *Id.*
- Administrator is liable for proceeds of mortgage collected in which his intestate had a life interest.
- Matter of Hobson*, 131 N. Y. 595.

V. SUITS BY AND AGAINST.

- It is well settled that when services are rendered to a testator under a contract to make compensation therefor by will, representatives may be sued.
- Collier v. Rutledge*, 136 N. Y. 621.
- The rule of damages in such case is the value of the services, and the fact that the testator was insolvent will not prevent a recovery. *Id.*
- Equitable action may be brought for an accounting in real and personal property. *Fatman v. Fatman*, 133 N. Y. 674.
- The ten years' Statute of Limitations applies to a proceeding under section 2606 of the Code brought by an administrator *de bonis non* to compel the personal representative of deceased to account.
- Matter of Rogers*, 153 N. Y. 316.
- Where foreign administrator has duly commenced an action upon an insurance policy found in that state by service on an agent of the company, the courts of this state should refuse to entertain jurisdiction of a subsequent action.
- Sulz v. Mutual Reserve Fund Life Ass'n*, 145 N. Y. 563.
- Claims against estate should be established by satisfactory evidence. *Van Slooten v. Wheeler*, 140 N. Y. 624.
- An attachment may be granted in an action of conversion brought by an administrator with the will annexed against an executor who had been removed. *Van Camp v. Searle*, 147 N. Y. 150.
- The surrogate has no power to compel a legatee to restore the amount of an overpayment, but the executor may sue to recover it. *Matter of Lang*, 144 N. Y. 275.
- An action upon a claim against an estate, brought more than six months after its rejection, is not barred by the statute, where the executor was a non-resident.
- Hayden v. Pierce*, 144 N. Y. 512.
- An executor cannot recover a payment voluntarily made.
- Matter of Hodgman*, 140 N. Y. 421.
- A mutual accounting between executor and executrix and execution of releases are a bar to action for further accounting by an executor. *Matter of Pruyn*, 141 N. Y. 544.
- Failure to make a minor child a party to the proceeding is not error. *Id.*

Executors and Administrators—Continued.

One who loans money to an executor, believing it to be misapplied, is responsible to those injured by conduct of executor.

Gotsberg v. U. S. Natl. Bank, 131 N. Y. 595.

But where the party believes the money to be obtained in good faith he is not liable. *Id.*

VI. PAYMENT OF DEBTS AND LEGACIES.

Before the personal estate of a testator's will be discharged from the burden of paying the debts, it must clearly appear that he intended that it should be.

Sweeney v. Warren, 127 N. Y. 426.

Mere silence of an executor after presentation of a claim will not establish such claim.

Matter of Calahan, 152 N. Y. 320.

When jurisdiction of the surrogate to decree payment of claim attaches. *Id.*

An executor is precluded by section 829 of the Code from testifying on the settlement of his accounts, as against contesting residuary legatees, to conversations with the decedent as to the merits of a claim which he has paid and for which he is seeking credit.

Matter of Smith, 153 N. Y. 124.

An assessment for a local improvement, for which the decedent was not personally liable under the terms of the charter, is not a debt or tax which the executor is required to pay under section 2719 of the Code.

Matter of Hun, 144 N. Y. 472.

An acknowledgment of a debt by an executor, without an express promise to pay, does not take the claim out of the Statute of Limitations.

Schutz v. Morette, 146 N. Y. 137.

An assent of an executor to the correctness of the account and a promise to pay the claim as presented cannot be implied from presentation and retention of the claim. *Id.*

The short Statute of Limitations cannot be evaded by successive presentations of claims arising out of the same transaction.

Titus v. Poole, 145 N. Y. 414.

Where, however, an action to recover for fraudulent representations is brought in due time and the plaintiff is nonsuited, an action based upon such representations as warranties, brought within one year thereafter, is within the saving provision of section 405 of the Code and is not barred. *Id.*

A creditor who has an unpaid debt against a decedent is not precluded by his omission to present debt, pursuant to notice from establishing it before executor is discharged.

Matter of Mullan, 145 N. Y. 98.

A statement in a petition for the sale of a decedent's real estate to pay debts that certain persons named are his heirs is equivalent to a statement that such persons are all the heirs.

Greenblatt v. Hermann, 144 N. Y. 13.

A bond given by a husband to his wife, without consideration, as

Executors and Administrators—Continued.

- a provision for her support and as a gift, is not enforceable against his estate. *Matter of James*, 146 N. Y. 78.
- A bequest to testator's widow of income "without restraint, deduction or interference," indicates an intent that she should hold the property in specie. *Id.*
- The claims of creditors are preferred to those of legatees or devisees because the only interest in the testator's property that he could transmit was what remained after payment of his debts. *Hogan v. Kavanaugh*, 138 N. Y. 417.
- The primary funds for the payment of debts and legacies is the personal estate, and the real estate cannot be resorted to until the personalty is exhausted in the ordinary course of administration. *Id.*
- An action in equity is not a proper proceeding for ascertaining who are creditors of the estate, etc. *Id.*
- Surrogate's Court has no power to pass upon an executor's personal claim except upon judicial settlement of his accounts. *Matter of Ryder*, 129 N. Y. 640.
- A debt due cannot be compromised by one a stranger to the estate, though letters are afterwards received. *Stuter v. McEntee*, 142 N. Y. 200.
- The fact of such payment may be used in mitigation of damages. *Id.*
- Remaindermen have the right to compel life-tenant to give security for proceeds of sale of realty. *Matter of Blauvelt*, 131 N. Y. 249.

VII. SALE OF REAL PROPERTY TO PAY DEBTS.

- Where will conferred a power of sale upon the executors for the purpose of paying debts, but sufficient personal estate was found, no title will be acquired under a conveyance executed by the executors to a party in interest who has knowledge of the facts and is not a purchaser for value. *Sweeney v. Warren*, 127 N. Y. 426.
- A discretionary power of sale in an executor for the purpose of paying debts may be exercised by the executor for the purpose of satisfying a debt found to be due to himself upon his final accounting. *O'Flynn v. Powers*, 136 N. Y. 412.
- The limitation in Code Civil Procedure (§ 2750), of three years after letters within which a creditor may petition for the sale of real property, was not intended to cut off the existing right of a creditor under the statute previously in force. *Id.*
- Such right on the part of an existing creditor is saved by the provisions of section 3352. *Id.*
- In proceedings to sell lands for debts, it is not necessary for the petition to state that the debt was "founded upon a debt which was in controversy in the action," in the language of Code Civil

Executors and Administrators—Continued.

Procedure (§ 2750), but that requirement may be effectually supplied by proof. *Matter of Bingham*, 127 N. Y. 296.

Circumstances under which, *held*, that the reason presumptively was that the claim was disputed and that the alleged debt was in controversy. *Id.*

The omission to name a mortgagee in an original petition or citation will not invalidate proceedings where the omission is subsequently cured. *Id.*

The omission from the petition of a parcel of real estate will not invalidate proceedings. *Id.*

Where creditor has not been guilty of *laches* the fact of misappropriation of funds by executor will not defeat proceeding. *Id.*

It seems that for the purpose of preserving a claim from the three years' limitation a *lis pendens* may be filed in proceedings upon a reference of the claim against the executors under the statute. *Id.*

Circumstances under which, *held*, not to make debts of testator a charge on his real estate so as to defeat proceedings in a Surrogate's Court to sell such lands. *Id.*

Where the will of a testator, largely indebted and possessing an inconsiderable personal estate, directed his executors and trustees to pay all his just debts and gave them all his property, both real and personal, upon certain specified trusts, for the benefit of his wife and children, and gave them power and authority to sell and convey any and all real estate, etc., the executors were vested with a general and unlimited power of sale. *Matter of Gantert*, 136 N. Y. 106.

In such case the debts are not made a charge upon the real estate, and the creditor must seek his remedy. *Id.*

The creditor, as a beneficiary of the power of sale, can compel its execution. *Id.*

VIII. ACCOUNTING AND FEES.

Executors are not entitled to one-half commissions for receiving assets of the estate which have come to them already invested, before their conversion into money or acceptance as cash by those entitled thereto. *Matter of McAlpine*, 126 N. Y. 285.

The rule in *Matter of Willets*, 112 N. Y. 289, disallowing full commissions to several trustees accounting for income, where such income amounts to less than \$100,000, explained and applied. *Id.*

The rule of double commissions to the same person first in the character of executor and then in that of trustee, applied. *Id.*

An allowance to executors for counsel fees incurred in resisting an application to revoke their letters on the ground of irresponsibility, rests in the discretion of the surrogate. *Matter of O'Brien*, 145 N. Y. 379.

Executors and Administrators—Continued.

Appraisers have no right, no matter how large the estate, to demand or receive more than the statute allows, unless interested parties consent to larger fees. *Matter of Harriot*, 145 N. Y. 540.

When finding based on the appraisers' affidavits that each of them had been actually and necessarily employed fifty days in making the inventory cannot be sustained. *Id.*

Where the executor applies for taxation of appraiser's fees after the same have been paid by him, the next of kin of the testator or the legatees have the right to be heard, either on the application itself or by affirmative motion to vacate the order made thereon. *Id.*

IX. TRUSTS.

Repairs to real estate set aside as part of the trust fund should be paid by executor and not from capital of trust fund.

Stevens v. Melcher, 152 N. Y. 551.

Where a portion only of a trust fund is set apart, the executors agreeing that, until the residue is set up, the *cestui que trust* shall receive "the interest to which she is in law entitled on the unpaid part of her trust legacy," she is entitled to the interest which the law allows at the time it accrues. *Id.*

No trust was created by the will giving widow use of house and personalty, and on her death to children.

Matter of Collins, 144 N. Y. 522.

Exemption ; *See Execution.*

Ex Post Facto Laws ; *See Constitutional Law.*

Express Companies ; *See Carriers.*

Extortion ; *See Criminal Law.*

A person may be convicted of the crime of attempting to extort money, although the person threatened, and who paid the money, was acting as a decoy for the police at the time.

People v. Gardner, 144 N. Y. 119.

Where the prosecution on a trial for an attempt to extort money has given evidence of prior intimacy between the defendant and complainant, it is error to exclude evidence to show that in his relations with the complainant defendant was acting under the direction of the Society for the Prevention of Crime.

Id.

The crime of extortion is a felony under the Penal Code.

People v. Hughes, 137 N. Y. 29.

What threats by an officer of a labor organization are sufficient to sustain an indictment for extortion. *Id.*

Extortion—*Continued.*

What does and what does not amount to illegal boycotting of a firm. *Id.*

Threat to prevent employes from resuming work unless money is paid in violation of Penal Code.

People v. Baronless, 133 N. Y. 649.

Extra Allowance; *See Costs.*

Extradition; *See Criminal Law.*

A fugitive from justice, surrendered to the authorities of this state, can be held or tried here for another crime than that charged in the warrant, where the act for which he was extradited and that for which he is indicted are the same.

People ex rel. Post v. Cross, 135 N. Y. 536.

Whether the rule would be the same with respect to the trial of a person extradited for another and different offense,—*quære.*

Id.

The obligations of the states to surrender to each other persons charged with crime is not founded upon comity or treaty, but upon the plain provisions of the Federal Constitution found in article 4, section 2.

Id.

F.

Factor; *See Agency*; *Bailment.*

False Imprisonment; *See Malicious Prosecution.*

An information showing that burglary had been committed, made on information and belief, protects the party making the same from action for false imprisonment.

Swart v. Rickard, 148 N. Y. 264.

When action for false imprisonment will not lie against justice who refused bail.

Austin v. Vrooman, 128 N. Y. 229.

Where the acts causing an unlawful arrest are doubtful the question should be submitted to the jury.

Carsen v. Dessau, 142 N. Y. 445.

Causes of action for slander and false imprisonment cannot be joined in same complaint.

De Wolfe v. Abraham, 151 N. Y. 186.

One procuring the execution of a void process is liable for false imprisonment.

Hewitt v. Newburger, 141 N. Y. 538.

False Pretense; *See Criminal Law.*

Under an indictment for obtaining an indorsement on a note by

False Pretense—Continued.

false pretenses, with intent to defraud the indorser, question of fraudulent intent is one for the jury to determine.

People v. Cole, affirmed without opinion, 137 N. Y. 531.

The courts of a county in which false representations are made for jurisdiction of offenses which are committed in another county.

People v. Peckens, 153 N. Y. 576.

An indictment for false pretenses is sufficient if it states and negatives one false pretense.

Id.

An indictment for obtaining a deed by false pretenses which gives a description of the premises and states the consideration, the names of the grantor and grantee and the value of the deed, sets out the deed sufficiently.

Id.

A statement that the land was of a certain value is a sufficient allegation of the value of the deed.

Id.

False and Fraudulent Representations ; *See Cancellation ; Contracts ; Estoppel ; Fraud ; Sales ; Vendor and Purchaser.*

What representations of material fact not known to be true amounts to actual fraud.

Hadcock v. Osmer, 153 N. Y. 604.

Positive assertions of existing facts known to be false are affirmations of fact and not mere expressions of opinion.

People v. Peckens, 153 N. Y. 576.

Federal Courts ; *See Courts ; Constitutional Law.*

Fees ; *See Attorney ; Costs ; Office ; Executors and Administrators.*

Feigned Issue ; *See Equity Practice.*

Felony ; *See Criminal Law.*

A crime punishable by imprisonment not exceeding five years is a felony.

People v. Hughes, 137 N. Y. 29.

Fences ; *See Railroads.*

Ferries ; *See Constitutional Law ; New York City.*

Fires, Fire Laws and Firemen ; *See Municipal Corporations.*

Common law did not require unusual precautions against a danger which owner was not bound to anticipate.

Parley v. Steam Gauge and Lantern Co., 131 N. Y. 90.

If a factory was not especially exposed to fire, the owner was not bound to erect fire escapes before enactment of the statute.

Id.

Duty imposed by statute is measured by its terms.

Id.

Fires, Fire Laws and Firemen—Continued.

Employe may maintain action for failure to comply with the statute. *Id.*

Section 1932 of the Consolidated Act does not apply to the speed of engines of the fire department when going to fires.

Farley v. Mayor, 152 N. Y. 222.

The driver of a hose cart does not assume the risk of the condition of the streets resulting from culpable negligence of the city. *Id.*

Fish.

A lease by one tenant in common to oyster beds does not prevent other tenants from taking oysters.

Mott v. Underwood, 148 N. Y. 463.

Fisheries; See Game Law.**Fixtures.**

When right of tenant to remove fixtures must be exercised before he abandons his right to remove such fixtures.

Talbot v. Cruger, 151 N. Y. 117.

In determining as between mortgagor and mortgagee, whether articles are or are not fixtures, the same rules prevail which are applicable to cases arising between grantors and grantees.

McFadden v. Allen, 134 N. Y. 489.

The lien of a mortgage upon buildings and machinery subsequently added to the property by a purchaser in possession, under an agreement by which he is to receive a deed upon payment of certain consideration, considered. *Id.*

It seems that in such case the mortgage is prior to the agreement made between the mortgagor and his vendee with reference to the fixtures. *Id.*

Food; See Constitutional Law.

The addition of a foreign and artificial ingredient to a food product is an adulteration. *People v. Girard*, 145 N. Y. 105.

Forcible Entry and Detainer; See Ejectment.**Foreclosure; See Mortgages.****I. BY ADVERTISEMENT.****II. BY ACTION OF FORECLOSURE AND SALE.**

1. *Mortgage and its Effect.*
2. *General Practice.*
3. *Judgment.*
4. *Sale and Rights of Purchaser.*

Foreclosure—Continued.**I. BY ADVERTISEMENT.**

Foreclosure by advertisement will bind an assignee appointed after first publication of notice.

Ostrander v. Hart, 130 N. Y. 406.

Where the sum due on a mortgage may be ascertained by computation, it may be foreclosed by advertisement.

Lewis v. Duane, 141 N. Y. 302.

Where no objection is made upon notice of sale and for years thereafter, the amount ascertained to be due will not be critically regarded. *Id.*

When prior mortgagee is not entitled to the severe and exceptional remedy of a strict foreclosure, requiring defendant to redeem within a specified time, without directing a sale of the mortgaged premises. *Moulton v. Cornish*, 138 N. Y. 133.

Whether, under the provisions of the Code of Civil Procedure, there can be a strict foreclosure,—query. *Id.*

II. BY ACTION OF FORECLOSURE AND SALE.**1. Mortgage and its Effect.**

The condemnation of a portion of mortgaged property, prior to foreclosure, withdraws from the lien of the mortgage the property so condemned.

Matter of City of Rochester, 136 N. Y. 83.

Rights of junior mortgagee, who was not made party to an action made prior to the mortgage, considered.

Denton v. Ontario Co. Nat. Bank, 150 N. Y. 126.

A party is not chargeable with knowledge of the commencement of a foreclosure action obtained by his attorney while working for another. *Id.*

The transfer by a mortgagee of a promissory note of the mortgagor, which was to be applied on the mortgage when paid, operates as a payment so long as it remains in the hands of the transferee. *Fitch v. McDowell*, 145 N. Y. 498.

The holder of such note takes no interest in the mortgage, and is not entitled to priority of payment over the holder thereof. *Id.*

An inaccurate description of the premises in a mortgage is cured by a reference therein to the deed to the mortgagor, which gave a correct description. *Bernstein v. Nealis*, 144 N. Y. 347.

2. General Practice.

Where plaintiff in a foreclosure suit made a prior lienor a party, seeking relief against the prior lien, and a sale was ordered subject to the lien, allegations in the answers of other defendants, unsupported by evidence, cannot be accepted as proof.

Quinlan v. Stratton, 128 N. Y. 659.

An omission to serve persons who are unnecessarily made parties is not prejudicial to other defendants.

Wager v. Link, 150 N. Y. 549.

Foreclosure—Continued.

Proof of a bond given by a grantee to the mortgagee conditioned for the payment of any mortgage deed remaining after the remedy against the land is exhaustible is admissible. *Id.*

The party having the first lien is entitled to satisfaction from surplus money. *Quackenbush v. O'Hare*, 129 N. Y. 485.

The right to have securities marshaled can be enforced only where all parties and the entire fund are before the court. *Id.*

Where the trustee of a mortgagee to secure bonds has left the country, no previous demand by a bondholder is necessary before commencing foreclosure.

Ettlinger v. Persian Rug and Carpet Co., 142 N. Y. 189. Application for appointment of a new trustee is not required before beginning action. *Id.*

A statutory foreclosure is not rendered void because taken against a parcel which is not primarily liable.

Jenks v. Quinn, 137 N. Y. 223. *It seems*, however, that equity would require the land primarily chargeable with the payment of the mortgage to be sold first. *Id.*

It seems that if a purchaser of real property subject to an existing mortgage intends to assert title to fixtures which he has erected upon the mortgaged premises by virtue of a special agreement, he is bound to do so in the foreclosure action. *McFadden v. Allen*, 134 N. Y. 489.

The plaintiff is not obliged to produce the bond upon the trial where its making, execution and delivery are admitted by the answer. *Anderson v. Culver*, 127 N. Y. 377.

Evidence of collusion is admissible in an action to foreclose a corporate mortgage brought on request of a competing company.

Farmers' Loan & Trust Co. v. N. Y. & Northern R. Co., 150 N. Y. 410.

An action to foreclose a mortgage on real property is within the provisions of subdivision 1, section 3253 of the Code, limiting an extra allowance to \$200.

Waterbury v. Tucker & Carter Cordage Co., 152 N. Y. 610. An order of the General Term reversing an order allowing an amendment of the complaint after trial, in an action of foreclosure, by setting up an admission from the mortgage by mistake of land intended to be covered by it, and asking a reformation of the mortgage, is discretionary.

Sprague v. Cochran, 144 N. Y. 104.

3. Judgment.

When judgment of foreclosure did not determine a wife's right to dower against a purchaser at the sale, or his grantee.

Nelson v. Brown, 144 N. Y. 384.

Foreclosure—Continued.

Judgment following the prayer of the complaint that junior mortgage be paid from proceeds of sale is binding upon senior mortgage and is a bar to an action to foreclose his mortgage.

Jacobie v. Mickle, 144 N. Y. 237.

An amendment of a judgment of foreclosure in an action in which the mortgage trustee was made a party but did not answer, by directing such trustee to convey to the purchaser at the sale, is at most voidable. *Harrison v. Union Trust Co.*, 144 N. Y. 326.

Where the complaint in an action of foreclosure alleges that the mortgage was given by the executrix in pursuance of a power of sale in the will, and the widow, both as executrix and individually, and the infant remaindermen are made parties thereto, the judgment therein is conclusive as to those facts against all the defendants, and a purchaser at a sale thereunder will take a good title. *Roarty v. McDermott*, 146 N. Y. 296.

4. Sale and Rights of Purchaser.

Where the owner of the equity has not been made a party to the foreclosure suit the purchaser at the sale becomes an assignee of the mortgage. *Townshend v. Thomson*, 139 N. Y. 152.

What evidence is insufficient to relieve the purchaser at a foreclosure sale from his purchase on a grant that the owner of fee was not served. *O'Connor v. Felix*, 147 N. Y. 614.

A resale may be ordered where the defendant was misled into neglecting to attend the sale by an oral agreement of plaintiff's attorney that the full amount of the mortgage would be bid.

Mutual Life Ins. Co. v. O'Donnell, 146 N. Y. 275.

Foreign Corporations; See Corporations.

A foreign corporation shown to have been legally incorporated and entitled to recognition in the state where it was organized, is entitled to recognition in this state in the absence of any statute affecting it, unless it appears that the corporation was formed to do acts prohibited by the laws of this state.

Demarest v. Flack, 128 N. Y. 205.

State may exclude all foreign corporations save those in employ of Federal Government or engaged in interstate or foreign commerce.

People ex rel. Southern Oil Company v. Wemple, 131 N. Y. 64.

A foreign corporation created for the purpose of dealing in real estate may transact such business in this state.

Lancaster v. Amsterdam Improvement Co., 140 N. Y. 576.

It is not the policy of this state to prevent a foreign corporation from transacting lawful business in this state. *Id.*

The facts that all the business done by a foreign corporation is in this state will not deprive it of recognition in this state. *Id.*

Foreign Judgments; See Conflict of Laws; Evidence.

Foreign Laws ; *See Conflict of Laws ; Evidence.*

Foreigners ; *See Aliens.*

Forfeiture ; *See Contracts ; Insurance.*

Forgery ; *See Criminal Law.*

One who procures a forged signature to be written, being present at the time, is properly charged as a principal.

People v. Tower, 135 N. Y. 457.

Indictment charging forgery when not demurrable is charging two crimes.

People v. Altman, 147 N. Y. 473.

Checks found on defendant cannot be proved in evidence unless they are shown to be forgeries.

Id.

Error to refuse to submit question of criminal intent to jury.

People v. Wiman, 148 N. Y. 29.

An unauthorized alteration of an instrument before execution does not constitute a forgery.

People v. Underhill, 142 N. Y. 38.

An instrument of a corporation is falsified only when it is altered after execution.

Id.

A paper is not a writing until it is signed.

Id.

Former Adjudication ; *See Estoppel ; Judgments ; Stare Decisis.*

The findings of a court in a prior action between the same parties on the precise point involved in a subsequent action, does not constitute a bar, unless followed by a judgment based thereon.

Springer v. Bien, 128 N. Y. 99.

In an action by a trustee of an estate to compel an accounting the beneficiaries are bound by an adjudication dismissing the complaint on its merits.

Matter of Straut, 126 N. Y. 201.

When a trustee may sue in his own name, the beneficiaries are bound by the results of the action.

Id.

When it must be presumed that the acts were distinct and separate offenses.

People v. Dewey, affirmed, 128 N. Y. 606.

Judgment in a former action, although defendant participated in it only on notice, is binding.

Carleton v. Lombard, Ayres & Co., 149 N. Y. 137.

Evidence held insufficient to prove that counter-claim was not disposed of and was not considered on its merits in a former action.

Wright v. Miller, 147 N. Y. 362.

Acceptance of offer of judgment of some articles claimed in replevin suit fixes titles of ownership of other articles in party making offer.

Shepherd v. Moodhe, 150 N. Y. 183.

A judgment in favor of a landlord in summary proceedings for non-payment of rent is a bar to an action by the tenant to cancel the lease.

Cochran v. Reich, 151 N. Y. 122.

Former Adjudication—Continued.

When General Term vacated but did not deny the application by attorney for lunatic for allowance, this decision was not a bar to an action against the estate of the lunatic after his death founded on the claim for services.

Carter v. Beckwith, 128 N. Y. 312.

A Surrogate's Court has no jurisdiction over realty left by a decedent or its avails, unless so provided by a will or by a statute.

Sweeney v. Warren, 127 N. Y. 426.

In the absence of proof by the record of what questions were litigated, or of the grounds of reversal, an order of reversal is not available as a previous adjudication of the validity of the contract.

Unglish v. Marvin, 128 N. Y. 380.

A party relying on a former adjudication must show that the point involved was shown in a former suit.

Id.

A judgment recovered by a married woman in an action to which her husband was not a party, reversed on appeal, is not a bar to a subsequent action by the husband upon the same claim.

Stamp v. Franklin, 144 N. Y. 607.

To conclude either of the parties, the judgment must be conclusive upon both.

Nelson v. Brown, 144 N. Y. 384.

Judgment upon failure to perform some preliminary act is not a bar to another action begun after the performance of such act.

Rose v. Hawley, 141 N. Y. 366.

Whether additional facts preclude a new action after judgment absolute, upon stipulation,—*quære*.

Id.

A judgment which establishes that upon the existing facts plaintiff had no valid title is not a bar to an action based upon a title attached to a subsequent possession.

King v. Townshend, 141 N. Y. 358.

Recovery of a void judgment is not a bar to another action for the same cause.

Reed v. Chilson, 142 N. Y. 152.

Upon the sale of salvage of a wrecked vessel, a foreign admiralty court has no power to award the surplus to a third party as claimant.

China Mut. Ins. Co. v. Force, 142 N. Y. 90.

It seems that the construction of a contract adopted by the court in awarding a *mandamus* against a state comptroller is not conclusive upon the state in a subsequent proceeding on the same claim before the Board of Claims.

Parmenter v. State, 135 N. Y. 154.

In an action for the cancellation of an agreement for separation made before an action for divorce was begun upon evidence *dehors* the instrument showing its invalidity, the judgment in the action for divorce was not a bar.

Galusha v. Galusha, 138 N. Y. 272.

A decision of a surrogate construing a disposition of personal property is not conclusive in an action to construe the will as to real estate.

Corse v. Chapman, 153 N. Y. 466.

Former Adjudication—Continued.

A former judgment cannot be nullified by the production of an earlier judgment not presented in the second action.

Shaw v. Broadbent, 129 N. Y. 114.

In order to be a bar a judgment should be in his favor and upon the same facts presented in a subsequent case. *Id.*

An issue in a former action erroneously decided does not estop the parties in a subsequent action. *Id.*

Dismissal of a former action does not bar a new action unless it includes some material issue common to both cases.

Rose v. City of Yonkers, 133 N. Y. 315.

The rule of *res adjudicata* applies to all judicial determinations.

Culross v. Gibbons, 130 N. Y. 447.

A judgment in a creditor's suit prosecuted by an assignee for creditor who has been substituted as such as plaintiff in that action, is not conclusive upon the same plaintiff in a similar subsequent suit brought by him individually.

Collins v. Hydorn, 135 N. Y. 320.

Such former judgment is not conclusive upon the principle applicable to judgments *in rem*. *Id.*

A prior mortgagee, who has foreclosed her mortgage without making a junior mortgagee a party, and purchased in a part of the premises at the sale, may maintain another action to foreclose her mortgage against the omitted party.

Moulton v. Cornish, 138 N. Y. 133.

A recovery in a former action against a trustee of simple interest upon the plaintiff's claim, is a bar to a subsequent action to charge his personal representatives with compound interest upon the same claim. *Price v. Holman*, 135 N. Y. 124.

In an action against a town to recover on coupons attached to its bonds issued in aid of a railroad, the defendant is estopped from questioning the validity of such bonds by a judgment rendered against it in an equitable action brought by it against the present plaintiffs for the cancellation of such bonds.

Williamsburgh Savings Bk. v. Town of Solon, 136 N. Y. 465.

It seems that the former judgment is conclusive upon the general question of the validity of the bonds. *Id.*

Whenever the same issue arises between the parties in whatever form of action, and whether involved directly or collaterally, they are forever precluded from averring and proving the fact to be otherwise. *House v. Lockwood*, 137 N. Y. 259.

A finding that a deed was intended as a mortgage, unnecessarily made in an action to compel the delivery of an entirely different deed, was not conclusive in a subsequent action. *Id.*

A judgment against a party is admissible in a subsequent similar action. *Dyett v. Hyman*, 129 N. Y. 351.

Discontinuance of an action as to some does not deprive a judgment of its validity as against others. *Id.*

Former Adjudication—Continued.

The appearance of a party in different capacity in each action does not deprive judgment of its conclusiveness. *Id.*

A party to an action is not bound by determination of a former action to which he was not a party.

Ostrander v. Hart, 130 N. Y. 406.

A judgment for specific performance of contract, sought to be avoided because of error, does not bind subsequent purchaser raising same objection.

Dingley v. Bon, 130 N. Y. 607.

Judgment against parties in a former action is binding upon them in a later action.

Tauziède v. Jumel, 133 N. Y. 614.

A party to a subsequent action is controlled by decision of some point in former action.

Id.

Claim to an estate in fee is not barred by the execution of a certificate vesting a life estate under decree in partition.

Viele v. Keeler, 129 N. Y. 190.

Where the validity of a lease is decided, such judgment cannot be attacked in a subsequent action on ground of invalidity of lease.

Bohn v. Hutch, 133 N. Y. 64.

A verdict of acquittal on ground of variance cannot be claimed in a later action to have been allowed on merits.

People v. Meakim, 133 N. Y. 214.

An adjudication by a surrogate in a collateral inheritance tax proceeding, that a certain amount of property passed to the residuary legatees, is only conclusive upon the subject of taxation.

Trustees of Amherst College v. Ritch, 151 N. Y. 282.

An order requiring a relative to pay a certain sum a week for the support of a poor person is not *res adjudicata* in an action upon such order to show that it had been terminated by the discharge from the poorhouse of such person, followed by subsequent self-support.

Aldridge v. Walker, 151 N. Y. 527.

Franchise; *See Corporation.*

Fraud; *See Contracts*; *Deceit*; *False Representations*; *Fraudulent Conveyances*; *Reformation of Instruments*; *Sales.*

A recommendation of credit given to an insolvent person addressed to "Mr. H." justifies any one of that name in acting on it.

Hadcock v. Osmer, 153 N. Y. 604.

The title of a buyer of goods cannot be impeached on the ground of fraud without showing that the false representations alleged to constitute the fraud were relied upon by the seller and induced the sale.

Hotchkiss v. Third Nat. Bk., 127 N. Y. 329.

It seems that if the buyer is insolvent and conceals the fact from the seller, the title of the property is not changed and may be reclaimed by the seller.

Id.

But mere insolvency without the intent to defraud is not sufficient.

Id.

Fraud—Continued.

Evidence tending to establish such fraudulent intent considered and *held* sufficient. *Id.*

What facts a complaint of action of fraud should allege.

Kley v. Healy, 127 N. Y. 555.

In such a case the plaintiff need not offer to restore or tender what was received in a transaction sought to be avoided. *Id.*

An investor is not chargeable with fraud because he fails to investigate affairs of concern that has failed.

Higgins v. Crouse, 147 N. Y. 411.

Failure to inquire into circumstances which suggest fraud makes parties so failing chargeable with knowledge of fraud. *Id.*

One who neither withholds nor misstates facts cannot be guilty of fraud because he does not disclose his opinion, and because the courts decide the law to be other than he claims it to be.

Trustees of Amherst College v. Ritch, 151 N. Y. 282.

Where fraud has been practiced upon the vendor by the vendee in a sale or conveyance of real estate, the vendor may either proceed in equity to rescind the contract by restoring the parties to their original position, or he may proceed at law in a contract and recover his damages for the deceit.

Yeomans v. Bell, 151 N. Y. 230.

In an action for damages for the fraud of the vendee in the purchase of real estate the vendor can only recover an indemnity for his loss. *Id.*

Absence of knowledge of fraudulent confession of judgment by judgment creditor considered to free judgment from fraud.

Galle v. Todd, 148 N. Y. 270.

An execution on such a judgment is void as against an attachment previously obtained. *Id.*

Fraudulent representations inducing party to marry is basis for action for loss of consortium. *Kujek v. Goldman*, 150 N. Y. 176.

Where fraud is made the basis of an action it must be proved, and in such case no recovery can be had upon proof of a right of action on contract or of some other character.

Truesdell v. Bourke, 145 N. Y. 612.

An omission from a statement of the assets and liabilities of a corporation of a claim against it which is being litigated is not fraudulent when party making statement believed its claim could not be enforced.

Kountze v. Kennedy, 147 N. N. 124.

The mere fact that the person making a statement of assets and liabilities of a corporation was the president thereof does not warrant an inference that such statement is given upon his personal knowledge. *Id.*

A vendor of goods, upon discovery of fraud inducing the sale, may rescind and follow the proceeds in the hands of a sheriff.

Converse v. Sickles, 146 N. Y. 200.

When a court of equity has power, upon rescission of the sale in-

Fraud—Continued.

duced by fraud, to reach such proceeds in the hands of the fraudulent vendee or his voluntary assignee.

American Sugar Refining Co. v. Fancher, 145 N. Y. 552.

Bank is not liable to refund the amount of checks obtained by fraud to the owner of the security fraudulently pledged, to obtain amount of checks, although the application was not made in fact until after the failure of and an assignment by such depositor.

Hatch v. Fourth Nat. Bk. of New York, 147 N. Y. 184.

Not only false statements, but intent to deceive must exist.

McIntyre v. Buell, 132 N. Y. 192.

Every party is deemed to intend the natural consequences of his own acts.

Coursey v. Morton, 132 N. Y. 556.

When a false statement by the vendor concerning the price he paid for the property is sufficient for a finding of fraud.

Fairchild v. McMahon, 139 N. Y. 290.

An action by a bondholder to annul a contract entered into by a committee of bondholders for the purpose of effecting reorganization with defendants and alleged to give the latter undue advantage and to be made without proper consideration, is not sustainable where the contract was within the authority of the committee and no fraud is claimed or shown.

Brooks v. Dick, 135 N. Y. 652.

An offer of judgment is not a collusion which violates any rule of law or gives the right to another creditor to interfere.

Columbus Watch Co. v. Hodenpyl, 135 N. Y. 430.

Sale of the interest of testator to surviving partners united in by all the legatees is valid after lapse of sixteen years.

Geyer v. Snyder, 140 N. Y. 394.

In order to recover property conveyed by fraud actual notice of the facts relied on must be shown.

Holland v. Brown, 140 N. Y. 344.

The possession must be such as is actually inconsistent with the title of apparent owner.

Id.

The fact that a contract is unnecessarily under seal is no bar to an action for fraud.

Bridges v. Goldsmith, 143 N. Y. 424.

Nor the incorporation of a clause barring right of action for fraud.

Id.

Where presumption of innocence is equal to presumption of guilt, the former prevails.

Constant v. University of Rochester, 133 N. Y. 640.

A person making statements recklessly and carelessly in order to form a contract is liable if such statements are false.

Daly v. Wise, 132 N. Y. 306.

In an action on a city contract where the defense is fraud, it is not incumbent on defendant to show precisely how the fraud

Fraud—Continued.

- was concocted, or what particular officials were implicated in it. *Nelson v. Mayor, etc., of N. Y.*, 131 N. Y. 4.
- Contract based upon fraud imposes no obligation. *Id.*
- An intent to defraud may exist when goods are received, although not when the order was given. *Whitten v. Fitzwater*, 129 N. Y. 626.
- The party defrauded may rescind after discovery and recover what has been parted with, or continue performance and claim damages. *Pryor v. Foster*, 130 N. Y. 171.
- If he rescind he must do so immediately upon discovery of fraud. *Id.*
- Continued occupation is no bar in an action for misrepresentations as to amount of coal required to heat house leased. *Id.*
- Fraudulent intent must be shown to set aside a conveyance not made upon a valuable consideration. *Kain v. Larkin*, 131 N. Y. 300.
- The character of the transaction is to be determined by the circumstances attending the execution of conveyance. *Id.*
- Every necessary fact must be established by competent evidence. *Id.*
- A creditor obtaining a bill of sale *bona fide* can hold it against the world. *Manning v. Beck*, 129 N. Y. 1.
- But otherwise where it is obtained with knowledge of an intended assignment. *Id.*

Fraudulent Conveyances; See Assignment for Creditors; Chattel Mortgages; Fraud.

- When an action by a judgment creditor in his own behalf to set aside a conveyance of the debtor as made in fraud of creditors can be maintained. *Prentiss v. Bowden*, 145 N. Y. 342.
- An execution issued on the day of, but after the death of the judgment debtor, without notice to his legal representatives or permission of the surrogate, is absolutely void. *Id.*
- A voluntary conveyance, by one indebted at the time, is presumptively fraudulent. *Smith v. Reid*, 134 N. Y. 568.
- The lands embraced in such conveyance may be sold under an execution against the fraudulent grantor, without setting aside the fraudulent conveyance. *Id.*
- A finding that a grantor was "financially embarrassed" is not equivalent to a finding of insolvency. *Jacobs v. Morrison*, 136 N. Y. 101.
- When a purchaser of real property at auction will not be relieved from his purchase on the ground that his title comes through a conveyance in trust to pay out of the proceeds certain outstanding liabilities. *Id.*
- A conditional sale of machinery under an agreement, by the

Fraudulent Conveyances—Continued.

terms of which the title remains in the seller until it is paid for, constitutes no fraud upon the creditors of the buyer, and no filing of the instrument is necessary under Laws 1884, chapter 315, as against such creditors.

Prentiss Tool & Supply Co. v. Schirmer, 136 N. Y. 305.

The fact that the buyer is permitted to sell materials embraced in the instrument, upon the condition that the proceeds of sales shall be accounted for and paid to the seller to apply upon the purchase-price of the property, will not render it void as to creditors. *Id.*

An absolute bill of sale of materials in course of manufacture, which remain in the possession of the seller, is presumptively fraudulent as against creditors. *Id.*

Words "without notice" construed.

Wilson v. Marian, 147 N. Y. 589.

Absence of knowledge of fraudulent confession of judgment by judgment creditor considered to free judgment from fraud.

Galle v. Todd, 148 N. Y. 270.

An execution on such a judgment is void as against an attachment previously obtained. *Id.*

When books of parties to fraudulent transfer may be proved to show valid debt or its non-existence.

White v. Benjamin, 140 N. Y. 258.

In an action to set aside conveyance on the ground of fraud, a waiver as to when a parcel will not operate to prevent the continuance of action as against another.

Geiler v. Littlefield, 148 N. Y. 603.

An action for general creditor of deceased insolvent debtor under chapter 740, Laws 1894, is compulsorily referable.

National Shoe & Leather Bk. v. Baker, 148 N. Y. 581.

A party attacking sale on the ground of fraud may prove fraudulent intent of vendor. *Beuerlien v. O'Leary*, 149 N. Y. 33.

Vendor testifying as to his good faith in a sale may cross-examine as to contrary admissions. *Id.*

Fraudulent transactions related in character or time are relevant as to intent. *Id.*

Excessive preference by a debtor to a creditor, followed by general assignment, is not necessarily void.

Abegg v. Bishop, 142 N. Y. 286.

The only remedy is an action to subject the excess to the claims of creditors under the assignment. *Id.*

Freight; See Carriers; Ships and Vessels.

Payment of freight is earned only by delivery of cargo at destination. *China Mut. Ins. Co. v. Force*, 142 N. Y. 90.

The law of the place where the affreightment is made determines the rights of the parties. *Id.*

G.

Game Laws.

Laws 1879, chapter 534, section 23, as amended by Laws 1884, chapter 127, which prohibits the taking of fish in certain waters, does not allow a criminal offense to be charged.

People v. Tanner, 128 N. Y. 416.

On an indictment for having a fish net on the shore of water inhabited by black bass, findings of jury held to be justified by weight of evidence. *Id.*

Fines and penalties must be paid to commissioners of fisheries under sections 238 and 240 of Game Law.

People ex rel. Huntington v. Crennan, 141 N. Y. 239.

Fines imposed before the game law was amended were also payable to said commissioners. *Id.*

Chapter 383, Laws 1896, authorizing the seizure of any vessel used in disturbing oysters is unconstitutional.

Colon v. Lisk, 153 N. Y. 188.

Gaming ; See *Betting and Gaming*.

The act of a racing association in offering premiums for horse-racing does not constitute gambling.

People ex rel. Lawrence v. Fallon, 152 N. Y. 12.

One who makes or records a bet on a horse-race authorized by chapter 570 of 1895 is not guilty of any offense under section 351 of the Penal Code. *Id.*

Section 17 of chapter 570 of 1895 imposing an exclusive penalty for making a bet on a horse-race is not unconstitutional. *Id.*

Gas Companies ; See *Manufacturing Corporations*.

Gas companies are bound to use their pipes in a reasonable manner. *Evans v. Keystone Gas Co.*, 148 N. Y. 112.

What are sufficient facts to justify a finding that the damage to trees was due to the leakage of gas. *Id.*

Whether a gas company was negligent in relying on pipings in a building is a question of fact for the jury.

Schemer v. Gas Light Co. of Syracuse, 147 N. Y. 529.

A lease which may be *ultra vires* and invalid as regards the state may be enforced between the parties.

Bath Gas Light Co. v. Claffy, 151 N. Y. 24.

A grant by municipal authorities to a gas company to lay its mains in the streets and highways, includes those streets subsequently laid out.

People ex rel. Woodhaven Gas Company v. Deehan, 153 N. Y. 528.

General Average ; *See Insurance ; Ships and Vessels.*

Gift ; *See Husband and Wife ; Voluntary Conveyance.*

Giving key which afforded access to bonds of the intestate at the time he expressed the intention to give them to the plaintiff, is sufficient to transfer present title if the key was given with that intent.

Pink v. Church, affirmed, *it seems*, without opinion, 128 N. Y. 634.

It is sufficient to constitute a gift of money that the donor delivered a check payable to the order of donee.

Picksley v. Starr, 149 N. Y. 432.

Circumstances under which money given to employe is to be considered a gift. *Id.*

The deposit of moneys in a savings bank in the name of the depositor "or" her daughter, and the delivery of the pass-book to the latter, who had possession of the mother's property, is not sufficient to establish a gift. *Matter of Bolin*, 136 N. Y. 177.

The law never presumes a gift ; intent and delivery are essential elements. *Id.*

The deposit of a sum in a savings bank in the name of the depositor's son, then under age, the retention of possession of the pass-book by the depositor for twenty-two years until his own death after that of the son, the latter never having knowledge of the deposit, is not a gift. *Beaver v. Beaver*, 137 N. Y. 59.

Good Will ; *See Partnership.*

Goods Sold and Delivered ; *See Sales.*

Grant ; *See Commissioners of Land Office ; Franchise ; Title to Lands.*

Conveyance of lands under waters can only be made to the owners of the upland.

E. G. Blakslee Mfg. Co. v. E. G. Blakslee's Sons' Iron Works, 129 N. Y. 155.

Effectual conveyance of uplands cannot be made where the rights and privileges of lowlands are excepted. *Id.*

Patent from the state is not assailable collaterally. *Id.*

Provisions of Laws 1878, chapter 171, transferring a portion of the Chemung canal to the city of Elmira for street purposes vest the fee to such property in the city.

De Witt v. Elmira Transfer Ry. Co., 141 N. Y., 495.

Provisions of 1 Revised Statutes, 748, section 1, that all the estate or interest of the grantor shall pass by the grant, unless the intent to pass a less estate shall appear by express terms or be necessarily implied in the terms of the grant, applies to a grant of state lands by act of the legislature. *Id.*

Grant—Continued.

Lands below high-water mark of navigable waters will not pass by a patent unless they are expressly included.

De Lancey v. Piepgras, 138 N. Y. 26.

A crown patent reserving rent is liable to forfeiture in case of non-payment, and the interests of the crown having become vested in the people of the state, the state may avail itself of the delinquency by legislative enactment. *Id.*

A conveyance by the comptroller of land between high and low water granted by the crown, with the proviso that it should not interfere with any privilege of mooring vessels or fishing, is subject to the same reservation. *Id.*

Structures built upon land below high-water mark to restrain cattle and for convenience of fishing and landing and open to public use, do not establish individual possession or occupancy so as to require notice upon their sale by the state. *Id.*

Growing Crops ; See Elements.**Guaranty ; See Surety.**

What conditions amount to a limitation and not a condition to guarantor's liability. *Powers v. Clarke*, 127 N. Y. 417.

The law does not hold creditor responsible for any deception practiced by the principal upon the guarantor, without the knowledge of the former. *Id.*

Case where a guaranty of payment of goods to be purchased, in form addressed to an individual, was intended to cover purchases from a firm carrying on business in the name of such individual. *Beakes v. DeCunha*, 126 N. Y. 293.

A provision in the guaranty requiring notice of purchase to be sent before a certain time to the guarantor, is satisfied by notice by mail, no objection ever having been taken thereto by the guarantor. *Id.*

A continuing guaranty of payment for goods purchased by a third person upon the faith of which such goods are sold and delivered upon credit is sustained by sufficient consideration. *Id.*

An agreement by an adjustor to pay the companies the cost of damaged goods, they to pay as for total loss, and if a company failed, he to pay the insured the cost price, is not within the statute of frauds. *Goodman v. Cohen*, 132 N. Y. 205.

Where a party, intending to enter into a contract with another, prior to its execution secures from the other a guaranty of the performance of such contemplated contract, in which the terms by which surety is to be bound are specified, and the contract, when drawn, does not correspond to the terms of the guaranty, the surety will be discharged from liability for default in the contract as made. *Page v. Krekey*, 137 N. Y. 307.

Guaranty—Continued.

The fact that the change in a contract is not material will not affect the rule. *Id.*

A guaranty given to a firm terminates with the existence of the firm. *Bennet v. Draper*, 139 N. Y. 266.

A bond given to a firm conditioned that the obligors would pay the obligees, "their successors or assigns," construed. *Id.*

What failure by a creditor to sue and prosecute suit to collect a note will as matter of law constitute a failure to use due diligence which will prevent recovery against a guarantor of collection. *Chatham Nat. Bk. v. Pratt*, 135 N. Y. 423.

A bond given on the dissolution of a partnership on behalf of a retiring partner that he would pay to his co-partner "one-half of the amount of the notes, accounts and claims of the late firm that shall prove to be uncollectible," construed.

Ralph v. Eldridge, 137 N. Y. 525.

The guarantor of a mortgage is not entitled to a reduction of the sum guaranteed by the insurance money received upon destruction of the property. *Smith v. Ferris*, 143 N. Y. 495.

A guaranty to pay installments as the work proceeds does not render the guarantor liable for a breach of contract resulting in abandonment of the work.

De Luka v. Goodwin, 142 N. Y. 194.

Where the terms clearly indicate a continuing guaranty, parol evidence is inadmissible to aid in the construction.

Henry McShane Co. v. Padian, 142 N. Y. 207.

What constitutes an absolute promise to pay a debt by one creditor of all the debtor's property.

Clark v. Howard, 150 N. Y. 232.

A creditor promising to pay debtor's debt, may be sued by another creditor who was not privy to the contract or consideration. *Id.*

Guardian-ad-Litem ; See Practice ; Infant.

Appointment for non-resident infant before expiration of time when substituted service of summons became complete is void.

Crouter v. Crouter, 133 N. Y. 55.

Guardian and Ward ; See Infant ; Parent and Child.

A judicial settlement of administrators or guardians is conclusive on the sureties upon their bonds, and its effect, so long as it is unreversed, cannot be affected by an order of the General Term.

Altman v. Hofeller, 152 N. Y. 498.

Mere acquiescence on the part of the ward would not estop him from asserting his right, nor does the fact that a portion of the proceeds was applied to secure the release of a chose in action

Guardian and Ward—Continued.

for the benefit of the ward authorize a deduction from the full amount due the ward.

Foley v. Mutual Life Insurance Co., 138 N. Y. 333.

The surrender of a policy of insurance on his own life in favor of his wife and children made by the insured after the death of his wife, who had attempted to make him testamentary guardian of the children, is void in absence of authority. *Id.*

A settlement by a guardian with his ward, procured by fraud, does not discharge the sureties on his bond so as to exonerate them from liability after such settlement.

Douglass v. Ferris, 138 N. Y. 192.

The decree of the Supreme Court setting the discharge aside, which fixed the amount due from the guardian, was conclusive upon the sureties. *Id.*

While they might ordinarily have availed themselves of a lack of due diligence as a defense to an action on their bond, where they were ignorant of the fact that the discharge had been decreed, the defense of *laches* would not avail in an action on the bond. *Id.*

Delay of more than a year upon the guardian's promise fulfilled in part to make restitution is not, as matter of law, *laches*. *Id.*

Omission to notify the sureties on discovery of the fraud by the ward does not release them. *Id.*

The estate of a surety, who had died after the action on the bond was commenced, was not discharged. *Id.*

Where a settlement by a ward was set aside for fraud and the liability of the sureties on the guardian's bond established in a subsequent action, costs in the action against the guardian should not be charged upon them. *Id.*

The guardian cannot bind the ward by an admission consisting of an unnecessary statement in behalf of the ward in support of the claim for death benefits from a benefit society.

Buffalo Loan, Trust, etc., Co. v. Knights Templar & Masonic Mut. Aid Asso., 126 N. Y. 450.

A Surrogate's Court has no power to direct the latter to pay over to the ward a sum, to the possession of which the guardian is personally entitled as life-tenant. *Matter of Camp*, 126 N. Y. 377.

Without the guardian's consent, the surrogate has not jurisdiction to deduct the gross value of his life interest and to direct the payment of the balance. *Id.*

The power of the surrogate is limited to the taking of an account and the direction of payment of the sum thereon found due; but the power to see that the fund once rightfully in the hands of the guardian, but lost by him, rests in a court of equity. *Id.*

The guardian of an infant by virtue of appointment by the surrogate acquires no authority until the letters of guardianship are signed. *Potter v. Ogden*, 136 N. Y. 384.

H.

Habeas Corpus.

When a traverse is interposed to a return to a writ of *habeas corpus* the issue is made up, and no further pleading is required. *Matter of Simon*, reversed in 128 N. Y. 625.

The court must proceed to hear the evidence, and a discharge without a hearing treating the allegations of the traverse as true is erroneous even though the traverse be not demurred to. *Id.*

Where a person is committed by a magistrate where brought before court, the only inquiry is whether the magistrate had jurisdiction of the case and authority to pronounce a judgment of imprisonment for the cause assigned.

People ex rel. Danziger v. Protestant Episcopal House of Mercy, 128 N. Y. 180.

A review on the merits is not permitted upon *habeas corpus*, and the return need not embody the evidence taken on the trial of the person in custody. *Id.*

The return to a writ of *habeas corpus* is to be assumed to be true under Code Civil Procedure (§ 2039), except in so far as its material allegations are controverted by the traverse. *Id.*

The provision of section 2039, requiring the judge to proceed in a summary way to hear the evidence, has no application unless the material allegations of the return showing jurisdiction are so controverted. *Id.*

Handwriting ; *See Evidence.*

Health ; *See Constitutional Law.*

Section 153 of the Public Health Law as amended in 1895, construed. *People v. Hawker*, 152 N. Y. 234.

To justify the quarantining of a person under section 5 of title 12 of the charter of Brooklyn, and section 14 of the Public Health Law, such person must be infected with or exposed to the contagious disease. *Matter of Smith*, 146 N. Y. 68.

Health officer of port of New York has power to use means to protect the public against contagion from infected vessels.

Lockwood v. Bartlett, 130 N. Y. 340.

Expenses to be a lien upon vessels or merchandise must be such charges as are incurred through official action. *Id.*

Usual charges for lighterage and storage are a lien upon the cargo. *Id.*

The actual existence of a nuisance gives a board of health jurisdiction to act.

People ex rel. Copcutt v. Board of Health of Yonkers, 140 N. Y. 1.

Health—*Continued.*

The owner of the property alleged to be a nuisance may bring an action to restrain its destruction. *Id.*

To escape liability, an order of the court should be obtained to abate a nuisance. *Id.*

Board of health of Yonkers may maintain an action to collect penalties imposed for violation of enactments against nuisances.

Board of Health of Yonkers v. Copcutt, 140 N. Y. 12.

Heirs; *See Descent; Distribution; Definition; Executors and Administrators.*

Highways; *See Dedication; Eminent Domain; Municipal Corporations; Negligence; Railroads.*

I. USE OF HIGHWAYS.

II. DEDICATION.

III. LAYING OUT, ALTERATION AND DISCONTINUANCE.

IV. ENCROACHMENTS.

V. REPAIRS.

I. USE OF HIGHWAYS.

The placing of an elevated railroad structure in a city street is inconsistent with its character as an open public street, and violates rights of property owners, notwithstanding the title to the soil of the way is in the municipality.

Williams v. Brooklyn Elevated R. R. Co., 126 N. Y. 96.

Where the property owner sues for damages the jury is to ascertain and award them, and they are to be governed by the evidence in determining the amount, and whether substantial or nominal damages only shall be awarded. *Id.*

Where the right of recovery is limited by the court to six years prior to the commencement of the action, thus commencing at a period when the road was in process of erection, a refusal of the court to charge that no damages were recoverable for any depreciation of rental value of the plaintiff's houses resulting from the contemplated building of the defendant's road is immaterial. *Id.*

The cars of street railways have a preference in the streets.

Fenton v. Second Ave. R. R. Co., 126 N. Y. 625.

In a suit by an abutting owner against an elevated railway company for an injunction and damages, damages are the diminution of the rental value of the premises.

Hine v. N. Y. Elevated R. R. Co., 128 N. Y. 571.

The right of action for the invasion upon the easements of abutting premises by the erection of an elevated railroad in a city

Highways—Continued.

street is in the owner of the fee in possession at the time of the construction of the road.

Kernochan v. N. Y. Elevated R. R. Co., 128 N. Y. 559.

The impairment of the easements by the existence and maintenance of the road, suffered during the period in which the premises were in the actual occupation of tenants under the lease, is in the lessor, and not in the lessees. *Id.*

Otherwise, *it seems*, if the lease was made prior to the erection of the road. *Id.*

The right of such lessor to damages, accruing after his death, goes to his heirs or devisees, and not to his personal representatives. *Id.*

The diminished rental value is a basis for awarding damages. *Id.*

It is no defense to an abutter's action for damages against an elevated railway company, by reason of diminished rental value of the property, that the premises during the period complained of were used for unlawful purposes.

Lawrence v. Metropolitan Elevated Ry. Co., 126 N. Y. 483.

What use of a road is sufficient to make it a public highway.

Wakeman v. Wilbur, 147 N. Y. 657.

Owners of lots abutting on a city street are entitled to the benefit of the street in front of their premises.

Reining v. N. Y., Lackawanna, etc., R. R. Co., 128 N. Y. 157.

The common council of a city cannot, under the guise of altering the grade, appropriate part of a street to the exclusive use of a railroad company. *Id.*

When authority is conferred upon council of a city by its charter to permit tracks of railroad to be laid in a street, property rights of abutting owners can be invaded. *Id.*

Although the common council of a city authorized the construction of an embankment with perpendicular walls five feet nine inches high for the railroad, plaintiff was entitled to damages. *Id.*

The right of abutting owners is not of that absolute character that they can resist or prevent any and all interference with the street to their detriment, such as a change of grade made under lawful authority, which change requires no compensation. *Id.*

It seems that incidental changes of the grade of streets rendered necessary to accommodate railroad crossings gives no right of action to abutting owners who may sustain injury. *Id.*

The party holding the fee is entitled to damages thereto.

McGean v. Met. Elevated Ry. Co., 133 N. Y. 9.

Whether the owner conveying the entire premises could reserve merely the right to sue for an injunction or for damages,—*quære.* *Id.*

Highways—Continued.

The legislature has general control over public streets and highways, though such power may be delegated.

Hoey v. Gilroy, 129 N. Y. 132.

In order to recover judgment the abutting land must have received some injury.

Becker v. Metropolitan Elev. Ry. Co., 131 N. Y. 509.

A comparatively slight ratio of increase in value does not indicate damage. *Id.*

Evidence that the value has not proportionally increased may be considered as ascertaining the damage. *Id.*

The difference in appreciation between the property affected and that in the vicinity may be considered in drawing a conclusion as to the amount of damages. *Id.*

The question is, what damage has actually been sustained by loss of easements. *Id.*

The ownership of the fee in a street has a substantial value to the abutting owner.

Matter of City of Buffalo, 131 N. Y. 293.

An award of substantial damages to the owner of the fee in a street is proper. *Id.*

His ownership is subject only to the public easement thereon as a highway. *Id.*

If the abutting owner does not hold the fee in the land, he has no right to compensation for taking of the street. *Id.*

But he has other easement for which he is entitled to compensation. *Id.*

Where two parties have equal right of way it must be exercised by each in a reasonable and careful manner.

O'Neil v. Dry Dock, East Broadway, etc., R. R. Co., 129 N. Y. 125.

The owner of a leasehold entitled to damages from a railroad.

Kearney v. Met. Elevated Ry. Co., 129 N. Y. 76.

An abutting owner cannot be deprived of his right to light, air and access without compensation.

Egerer v. N. Y. Central, etc., R. R. Co., 130 N. Y. 108.

An abutting owner may maintain action for damages while the property was in possession of tenants.

Mortimer v. Manhattan Ry. Co., 129 N. Y. 81.

An abutting owner is not entitled to damages where the property has increased in value after the taking of the easement.

Bohm v. Met. Elevated Ry. Co., 129 N. Y. 576.

An abutter's action will not be defeated because he purchased the property after the erection of the railroad.

Sterney v. N. Y. Elevated R. R. Co., 129 N. Y. 619.

Nor does he lose the right to recover rental damages because the premises were in possession of the tenants. *Id.*

A statement in a petition for grant of land under water for

Highways—Continued.

causeway without acceptance by the public authorities does not create a public highway. *Iselin v. Starin*, 144 N. Y. 453.

A turnpike upon abandonment by the company becomes a highway.

People ex rel. Keene v. Bd. of Supervisors of Queens Co., 151 N. Y. 190.

Where the right to erect an elevated railroad was not secured from abutting owners of property its operation is a continuing trespass.

Thompson v. Manhattan Ry. Co., 130 N. Y. 360.

The owner of an abutting lot on a public street is entitled to compensation for deprivation of light, air and access.

Hughes v. Met. Elevated Ry. Co., 130 N. Y. 14.

The use of a street by an elevated railroad is inconsistent with the purpose for which city streets are designed. *Id.*

The street rights of an abutting owner need not be established by conveyances in specific forms. *Id.*

Private rights belonging to abutting lots arise by operation of law. *Id.*

The term, abutting lot, denotes a lot bounded on the side of a public street. *Id.*

The theory of an action by an abutting owner against an elevated railroad is that of trespass.

Moore v. N. Y. Elev. R. R. Co., 130 N. Y. 523.

While the trespass continues defendant is liable to abutting owner for damages occasioned by operation of the road. *Id.*

The liability of defendant is in the nature of an action on the case. *Id.*

The continued invasion of the privacy of the tenants is an actionable injury. *Id.*

What judgment will not warrant punishment for contempt.

Ketchum v. Edwards, 153 N. Y. 534.

There is a legal presumption against the grantor intending to reserve to himself the title to the soil in the highway.

Holloway v. Southmayd, 139 N. Y. 390.

The duty of changing the grade of an intersected street occasioned by the construction of a railroad rests upon the railroad company under the General Railroad Act; rights and liabilities of railroad considered.

Rauenstein v. N. Y., Lackawanna, etc., R. R. Co., 136 N. Y. 528.

When a lot is sold bounded by a street the purchasers have an easement in the street for purposes of access which is a property right. *Lord v. Atkins*, 138 N. Y. 184.

The grantor, owning to the center of the highway, conveyed by deed running to the side of the highway only, but covering all the easements, privileges, advantages and appurtenances belonging to the land, this gave a permanent right to an open way

Highways—Continued.

on so much of the highway as bordered upon the premises conveyed. *Holloway v. Southmayd*, 139 N. Y. 390.

In an abutter's action against an elevated railroad the defendant is entitled to have the court find that substantially all the damages are consequential.

Bookman v. N. Y. Elevated R. R. Co., 137 N. Y. 302.

The right of a telephone company to string its wires along a city street is subordinate to that of a street railroad company operating its road thereon.

Hudson River Telephone Co. v. Waterboliet Turnpike and Ry. Co., 135 N. Y. 393.

It is a part of the compact of such telephone company with the state that the maintenance of its lines of communication shall not prevent the adoption by the public of any safe mode of transit. *Id.*

It seems, however, that the railroad company is not at liberty to discharge electricity into the ground in great volume in such manner that owing to the conductive properties of the earth it will be conveyed upon adjoining grounds with such force and to such extent as to interfere with the business of an adjoining owner. *Id.*

Consent of the abutting fee owners in a highway must be obtained for the erection of telegraph poles.

Eels v. American Telephone., 143 N. Y. 133.

The easement in a rural highway is one of passage only. *Id.*

Distinction between city street and rural highway as to uses pointed out. *Id.*

II. DEDICATION.

What does not constitute a dedication of property for a public highway. *Mark v. Village of West Troy*, 151 N. Y. 453.

Before land can become a public highway by dedication there must be an acceptance by some formal and unambiguous action of the public authorities or use by the public.

People v. Underhill, 144 N. Y. 316.

What is not sufficient to show an acceptance by the village authorities of the highway. *Id.*

III. LAYING OUT, ALTERATION AND DISCONTINUANCE.

On an appeal from order of commissioners of highways, laying out a highway, what questions are to be considered.

People ex rel. Cook v. Hildreth, 126 N. Y. 360.

The construction of a railway embankment in front of plaintiff's premises is a permanent appropriation of the street, and entitles plaintiff to damages for injury to his easements of access.

Jearume v. N. Y., Lackawanna, etc., R. R. Co., affirmed, 128 N. Y. 623.

Highways—Continued.

Where defendant, who had mapped out a tract with streets and sold a lot to plaintiff, who graded it to meet the street before it, not then accepted as a public street, afterward lowered the grade of the street, interfering with plaintiff's access to his lot therefrom, *held*, that the latter had an easement in the street in front of his lot, and was entitled to an injunction and damages. *Cunningham v. Fitzgerald*, 138 N. Y. 165.

What acts do not afford basis for proceedings to ascertain the adjoining owner's damages under Laws 1883, chapter 113, occasioned by an alteration of the grade.

Whitmore v. Village of Tarrytown, 137 N. Y. 409.

Act of the colonial legislature providing that a surveyor be appointed to lay out a road to the breadth of two rods, which had been laid out four rods wide, though without provision for compulsory taking or compensation to the owner, was mandatory. *Blackman v. Riley*, 138 N. Y. 318.

The decision of the County Court, upon motion to confirm the decision of commissioners appointed to determine the necessity of a highway, is final only on the questions of necessity and the amount of compensation. *Matter of De Camp*, 151 N. Y. 557.

The capacity of a town to take a grant in fee for highway purposes included the power and capacity to take a conveyance of the perpetual right to use a road as a public highway during the winter months only. *Hughes v. Bingham*, 135 N. Y. 347.

Where such deed has been delivered and accepted, and the road recognized by the proper authorities as one of the highways of the town, it cannot be discontinued by a vote at a town meeting. A town meeting has no power to discontinue a highway; that can be done only by the intervention of the authorities and according to the procedure pointed out in the statute. *Id.*

It is not proper to review by *certiorari* an order of the County Court confirming the report of commissioners appointed to lay out a highway.

People ex rel. D. L. & W. R. R. Co. v. County Court of Onondaga County, 152 N. Y. 214.

Written petition of village free-holders is not necessary to the discontinuance of a street.

Excelsior Brick Co. v. Village of Haverstraw, 142 N. Y. 146.

Non-user for six years destroys the right to use a highway as such. *Id.*

IV. ENCROACHMENTS.

An action cannot be maintained for injury to public rights without showing that private rights have been invaded.

Woodruff v. Paddock, 130 N. Y. 618.

An encroachment must be explicitly designated by a notice to remove. *Town of Sardinia v. Butler*, 149 N. Y. 505.

Highways—Continued.

What notice is not sufficient to compel removal of fence. *Id.*
 An action will lie to restrain the owner of a building from unlawfully obstructing a sidewalk.

Flynn v. Taylor, 127 N. Y. 596.

In such case, direct proof of peculiar damage is not needed where the circumstances show that the plaintiff sustained special damage. *Id.*

In a populous city, whatever unlawfully turns the tide of travel from the sidewalk directly in front of a retail store to the opposite side of the street, is presumed to cause special damage to the proprietor of that store. *Id.*

Whether a particular use of a street is an unreasonable use or not is a question of fact depending on all circumstances of the case. *Id.*

Obstruction of highway may be abated by an action by one who sustains an injury, and he may also recover damages.

Wakeman v. Wilbur, 147 N. Y. 657.

What is sufficient to give individual right of action for obstruction of highway. *Id.*

Party notified that his house encroaches on highway upon proof to the contrary may maintain injunction to restrain interference.

Flood v. Van Wormer, 147 N. Y. 284.

Time in which to commence action to enforce right of an abutting owner to damages for an invasion of his rights in the public streets.

Galway v. Metropolitan Elevated Ry. Co., 128 N. Y. 132.

Obstructions upon a highway used for more than forty years may be removed.

James v. Sammis, 132 N. Y. 239.

Technical objection to notice of removal is not available. *Id.*

Under colonial statutes the commissioners had power to make the highway. *Id.*

Review of subject of highway by user. *Id.*

V. REPAIRS.

Negligence may consist in omission to erect barriers as in leaving bed of highway defective.

Bryant v. Town of Randolph, 133 N. Y. 70.

Commissioners are not relieved from care and control of approaches to railroad crossing. *Id.*

A town is liable for injuries resulting from a defective highway. *Id.*

Where an act for the construction of sewers for one town provided for a trunk sewer through an avenue of another town, which was not benefited by the improvement, the consent of the owners of the land through which it passed must be gained or the title thereto gained by legal proceedings. The prin-

Highways—Continued.

ciples justifying the use of streets for sewers without compensation to adjacent owners did not apply.

Van Brunt v. Town of Flatbush, 128 N. Y. 50.

Actual notice of a defect in the highway must come to the commissioners to render them liable.

Lane v. Town of Hancock, 142 N. Y. 510.

Failure to recover against the commissioners bars a recovery against the town. *Id.*

The provision of Laws 1881, chapter 700, subjecting a town to liability for injuries by reason of defective highways, applies to the case of an obstruction placed in the highways as well as to acts of physical disturbance or injury to the bed of the roadway.

Whitney v. Town of Ticonderoga, 127 N. Y. 40.

Homicide ; See Criminal Law.

Guilt cannot be established beyond a reasonable doubt on a trial for murder by testimony of a witness who is irresponsible either from mental or moral defects. *People v. Ledwon*, 153 N. Y. 10.

Allegations in a common-law action in an indictment for murder, held sufficient to sustain a conviction for murder in the first degree. *People v. Constantino*, 153 N. Y. 24.

It is not error for the court, when charging on the question of deliberation and premeditation, to illustrate a minute of time by his watch. *Id.*

The fact that jury in charge of officers attended church is not ground for reversal. *Id.*

Facts competent on the question of premeditation and deliberation. *People v. Scott*, 153 N. Y. 40.

What may be proof on a trial for murder in the first degree to establish motive. *Id.*

Evidence sufficient to corroborate a confession of homicide considered. *People v. Hoch*, 150 N. Y. 291.

When evidence of the mental condition of defendant at the time of trial may be introduced. *Id.*

What is sufficient evidence to corroborate testimony of an accomplice. *People v. Mayhew*, 150 N. Y. 346.

When the question of motive is unimportant.

People v. Feigenbaum, 148 N. Y. 636.

Evidence sufficient to sustain a conviction of murder in the first degree. *People v. Youngs*, 151 N. Y. 210.

Whether the killing was deliberate and premeditated is always a question for the jury in the light of the facts.

People v. Conroy, 153 N. Y. 174.

What sudden transport of passion excited by words of contempt does not constitute murder in the first degree.

People v. Barberi, 149 N. Y. 256.

Homicide—Continued.

Evidence of the relation of parties is admissible on the subject of deliberation. *Id.*

Though killing was in a fit of passion it may be murder in the first degree when accompanied by deliberation.

People v. Tuckewitz, 149 N. Y. 240.

It is admissible to show premises where homicide occurred by photograph. *People v. Pustolka*, 149 N. Y. 570.

What are not leading questions put to a witness as to actions of defendant from which insanity might be inferred.

People v. Nino, 149 N. Y. 317.

When charged that defendant must clearly prove insanity is erroneous. *Id.*

It is prejudicial error for a court to state to expert that there has been no testimony of physicians as to delusions. *Id.*

On trial of an indictment for murder what evidence of defendant's relations with other women are not admissible.

People v. Strait, 148 N. Y. 566.

When it would be prejudicial error against defendant to allow witness who has testified that defendant was sick at the time to state the character of his disease.

People v. Corey, 148 N. Y. 476.

It is erroneous not to charge clearly the rule in relation to the consideration of defendant's intoxication. *Id.*

The Court of Appeals must regard all valid exceptions taken by the defendant. *Id.*

Statements to jury by witness in absence of defendant is ground for new trial.

People v. Gallo, 149 N. Y. 106.

Facts sufficient to sustain a conviction of murder in the first degree.

People v. Hampton, 144 N. Y. 639.

Evidence sufficient to sustain a conviction of murder in the first degree.

People v. Wilson, 145 N. Y. 628.

Testimony that murdered man said, "There go the burglars," is admissible as bearing upon the opportunity the suspected men had to enter into an agreement to resist arrest. *Id.*

Evidence that the suspected persons were brothers is also admissible as bearing on the issue of agreement between them to effect escape together. *Id.*

Where the parties to a quarrel were separated and one of them returns with a pistol and shoots the other, the act is murder.

People v. Kerrigan, 147 N. Y. 210.

A postponement of a trial for murder is properly denied where it is not asked on the ground of absence of witnesses.

People v. Shea, 147 N. Y. 78.

What is competent on the question of intent and deliberation. *Id.*

A conviction of murder in the first degree will not be reversed by the Court of Appeals where the finding is not clearly against the weight of evidence. *Id.*

Homicide—Continued.

The killing of one person in an attempt to shoot another is murder. *People v. Mills*, 143 N. Y. 383.

Where circumstantial evidence is sufficient, conviction of murder will be sustained. *People v. Johnson*, 140 N. Y. 350.

Conviction of murder in first degree in killing an officer while under arrest without a warrant will be sustained upon sufficient evidence. *People v. Wilson*, 141 N. Y. 185.

The effect of intoxication on the question of premeditation is for the jury. *People v. Leonardi*, 143 N. Y. 360.

When a will made by the wife prior to the marriage, giving her property to her husband, is admissible on the question of motive.

People v. Buchanan, 145 N. Y. 1.

A deed made by the wife to defendant after marriage and his conveyance of the property are admissible. *Id.*

Declarations of defendant showing hostile feelings toward his wife are relevant on the question of motive. *Id.*

When a refusal to strike out all evidence on one count is proper. *Id.*

Reply to defendant's counsel by the court that, "If the facts are against the defendant, that is not my fault; it is unfortunate, but I cannot help it," unobjectionable.

People v. Leach, 146 N. Y. 392.

An appeal direct to the United States Supreme Court from the decision of a District Court judge at chambers denying a motion for *habeas corpus* is unauthorized.

People v. Buchanan, 146 N. Y. 264.

A reprieve by the governor to a day certain, in a capital case, authorizes the execution of sentence on that day. *Id.*

Where the time fixed by the reprieve has passed and the sentence remains unexecuted but in full force, the defendant should be brought before the court to have a date of execution fixed. *Id.*

Evidence insufficient to sustain a defense of irresponsibility on account of epilepsy. *People v. Burgess*, 153 N. Y. 561.

One who is not an expert may testify that a substance is blood. *Id.*

When it is apparent that no harm resulted to defendant on admission of incompetency, evidence is not a ground for reversal in a capital case. *Id.*

Where the accused was indicted for killing his wife, and it appeared that he killed her and a man who was with her, the court instructed the jury that if he intended to kill the man and killed her, he was as much guilty of murder as if he intended to kill her, which was excepted to, as the indictment charged only intent to kill the wife, *held*, no error.

People v. Osmond, 138 N. Y. 80.

The prosecution on a trial for murder is not bound to prove motive.

People v. Johnson, 139 N. Y. 358.

Homicide—Continued.

What proof must be given to justify the taking of life in self-defense. *Id.*

Sufficiency of evidence to justify conviction under an indictment for murder. *Id.*

Evidence of a circumstantial character to sustain a conviction of murder by poisoning, considered and held sufficient.

People v. Harris, 136 N. Y. 423.

Judgment on conviction of murder in the first degree, affirmed, the jury discrediting the testimony of the accused.

People v. Rohl, 138 N. Y. 616.

Judgment of conviction of murder in the first degree, the victim being the wife of the accused, affirmed.

People v. Geogham, 138 N. Y. 677.

Verdict of conviction of murder in the first degree of defendant who killed his wife sustained on review of circumstantial evidence.

People v. Hamilton, 137 N. Y. 531.

Verdict of conviction for murder sustained on review of the evidence, the defense being justification.

People v. Fitzthum, 137 N. Y. 581.

Conviction of murder in the first degree for killing a woman, where the accused was the only witness in his own behalf, sustained on the evidence.

People v. Delfino, 139 N. Y. 625.

Conviction of murder, based in part on testimony of alleged accomplice and alleged confession of defendant, sustained on review of the evidence.

People v. McGuire, 135 N. Y. 639.

Evidence of accused sufficient to justify conviction of manslaughter in the first degree.

People v. Webster, affirmed in 139 N. Y. 73.

A charge that the jury might find intent to kill from the nature of the weapon and the manner of its use, in connection with an instruction that they should not convict if they had any reasonable doubt of such intent, is free from error. *Id.*

The rule as to the obligation to avoid the necessity of taking human life, stated. *Id.*

Husband and Wife. *See* *Curtsey*; *Divorce*; *Dower*; *Marriage*; *Married Woman*.

I. JOINT PROPERTY.

II. CONTRACTS BETWEEN.

III. HUSBAND'S RIGHTS AND LIABILITIES.

IV. WIFE'S RIGHTS AND DISABILITIES.

V. HER SEPARATE ESTATE.

I. JOINT PROPERTY.

Tenancy by the entirety is severed by divorce and each takes a share as tenant in common. *Stelz v. Schreck*, 128 N. Y. 263.

Husband and Wife—Continued.

Under a conveyance to husband and wife without restriction, they take as tenants by the entirety. *Id.*

A tenancy by the entirety, originated in the marital relation, resembles a joint tenancy in that there is a right of survivorship attached to both, but is not a joint tenancy in substance or form. *Id.*

Where the intention is plainly expressed, may hold as tenants in common or as joint tenants. *Joss v. Fey*, 129 N. Y. 17.

The wife's interest is alienable by her. *Id.*

Her grantee may maintain an action for partition. *Id.*

The intention of the grantor as appearing in the instrument controls. *Miner v. Brown*, 133 N. Y. 308.

If the grant is made without any words characterizing the estate, each shall take by entirety. *Id.*

A devise to husband and wife for their use, benefit and support renders them tenants in common. *Id.*

Where husband and wife each contribute from their separate means to a joint investment in a bond and mortgage taken in the names of both, the inference is that they become tenants in common. *Matter of Albrecht*, 136 N. Y. 91.

It seems that the relation of tenants by the entirety can only exist where there is a conveyance of a vested interest in or title to real property. *Id.*

While a husband and wife take as tenants by the entirety under a deed to both, they are tenants in common or joint tenants of the use while the question of survivorship is in abeyance.

Hiles v. Fisher, 144 N. Y. 306.

A mortgage executed by a husband who holds by the entirety with his wife is effectual to cover his interest. *Id.*

II. CONTRACTS BETWEEN.

In an action by a wife against the personal representatives of her deceased husband, a promise to repay her must be shown to allow her to recover for moneys paid by her for support.

Nostrand v. Dittus, 127 N. Y. 355.

A contract for employment made prior to 1892 is extinguished by the marriage of the parties.

Matter of Callister, 153 N. Y. 294.

A bond given by a husband to his wife, without consideration, as a provision for her support and as a gift, is not enforceable against his estate.

Matter of James, 146 N. Y. 78.

An ante-nuptial agreement cutting off dower without an equivalent therefor is void. *Graham v. Graham*, 143 N. Y. 573.

III. HUSBAND'S RIGHTS AND LIABILITIES.

A husband acting only as an agent of his wife is not liable for

Husband and Wife—Continued.

her failure to lease premises though he has negotiated the lease.

Bear v. Bonynge, 147 N. Y. 393.

When a judgment recovered by a married woman in an action to which her husband was not a party, reversed on appeal, is not a bar to a subsequent action by the husband upon such claim.

Stamp v. Franklin, 144 N. Y. 607.

An authority given by a husband that payment of a claim for board may be made to his wife does not vest in her legal title to the claim.

Id.

When an action of ejectment will not lie against the husband of a tenant with whom he lives on the land, and who claims possession of it.

Danihee v. Hyatt, 151 N. Y. 493.

Fraudulent representations inducing party to marry is basis for action for loss of consortium.

Kujek v. Goldman, 150 N. Y. 176.

IV. WIFE'S RIGHTS AND DISABILITIES.

A wife is entitled to support from income of trust which was for the support of husband only.

Wetmore v. Wetmore, 149 N. Y. 520.

A married woman is presumptively not chargeable with an arrangement made by her husband in her absence in respect to the purpose for which a mortgage executed by her is given.

Parker v. Collins, 127 N. Y. 185.

The right of a wife to insure her husband's life for her own benefit, since it is not property, does not prevent equity from following insurance moneys and charging them with a trust in favor of one whose moneys were used in the payment of premiums.

Holmes v. Gilman, 138 N. Y. 369.

The wife may take the legal title to personal property by gift from her husband and maintain an action thereon.

Fruhaufl v. Bendheim, 127 N. Y. 587.

Such gift is valid although the property consists of a contract for the purchase of land.

Id.

Where husband and wife are seized of an estate as tenants by an entirety, and when in a proceeding to condemn a right of way the husband alone is served, the wife may restrain the construction of a sewer across the property.

Grosser v. City of Rochester, 148 N. Y. 235.

Under the statutes of this state a married woman has such freedom of control over her own real property that her husband cannot, without her consent and against her will, maintain a vicious domestic animal thereon, and she is liable for injuries committed by animal owned by the husband.

Quilty v. Battie, 135 N. Y. 201.

Where the husband is united in the action against the wife for damages merely on the ground of his marital liability and

Husband and Wife—Continued.

not upon any allegation of his own ownership or knowledge of the vicious propensities, the action cannot be sustained against him. *Id.*

V. HER SEPARATE ESTATE.

Only the common-law status of married women has been abrogated to the extent set forth by statute.

Porter v. Dunn, 131 N. Y. 314.

Where the services of wife are rendered at husband's expense, he is entitled to recover for such services. *Id.*

Unless it is liable, the property of the wife cannot be seized upon execution against the husband.

Edwards v. Wood, 131 N. Y. 350.

There must be a surrender by a wife to her husband of some interest or dominion over her real property by some act or agreement on her part expressed or implied, which will take from her at least some right or incident ordinarily pertaining to the absolute ownership of real estate.

Mygatt v. Coe, 147 N. Y. 456.

That which a married woman acquires by her trade, services or business, carried or performed on her separate account, is her own separate property.

Blaechinska v. Howard Mission & Home for Little Wanderers, 130 N. Y. 497.

The statute does not apply to labor done by the wife for the husband in his household. *Id.*

Where their joint earnings are used to support the family, if there is no special contract giving her the proceeds of her labor they belong to the husband. *Id.*

When she works for him upon his farm she is legally entitled to no compensation. *Id.*

Under Laws of 1884, chapter 381, a married woman may enter into contracts with any one except her husband. *Id.*

Previously she could not make such contracts unless she had a separate estate or business. *Id.*

Under act of 1860, a wife could contract with her husband in relation to her separate estate. *Id.*

The enabling statutes do not relieve a wife of rendering services to her husband. *Id.*

I.

Imprisonment; *See Arrest; Bail; Contempt; Criminal Law; False Imprisonment.*

Incumbrances; *See Cloud on Title; Covenants; Deeds; Foreclosure.*

Indemnity; *See Bonds*; *Injunction*; *Replevin*; *Sheriff*.

When notes specify that bonds were deposited as security and no bonds were given, an indorser is not discharged because such bonds were not deposited. *Nassau v. Campbell*, 147 N. Y. 694.

An oral promise to indemnify a person for becoming indorser on a note of a third person is not within the statute of frauds.

Jones v. Bacon, 145 N. Y. 446.

An indemnitor of an indorser of the note of a third person is discharged from liability on his agreement by the execution of the indorser of a release to the maker of the note. *Id.*

Where a sheriff who has taken a bond of indemnity, by collusion deprives the indemnitors of the opportunity to present and have determined in the ordinary course of legal proceedings his liability, when sued by third persons for an act to which the indemnity extends, and in bad faith prevents the indemnitors from putting in a defense interposed in good faith and not frivolous, he cannot avail himself of a judgment obtained in that action as a ground of recovery on the bond.

Wheeler v. Sweet, 137 N. Y. 435.

Otherwise, *it seems*, in the absence of fraud or collusion, though the indemnitors were not parties in fact to the litigation, and even though they had no notice of the action. *Id.*

Indians; *See Constitutional Law*.

Right of state to purchase Indian land under Constitution declared and title of purchaser of such land sustained.

Seneca Nation of Indians v. Christie, 126 N. Y. 122.

The provision in section 12 of the act of Congress of March 30, 1802 (Indian Intercourse act), construed and *held* not to require proclamation by Federal authorities. *Id.*

The purpose of the proviso was to establish a Federal supervision over contracts for the extinguishment of Indian title to lands. *Id.*

What will amount to a confirmation of the sale and conveyance under subsequent act of Congress, and a waiver of restrictions imposed by former acts of Congress, if any such existed. *Id.*

Indictment; *See Criminal Law*.

When court has power to refuse to strike out previous acts in an indictment and retain them for reference.

People v. McLaughlin, 150 N. Y. 365.

An indictment is not demurrable on the ground that it charged two crimes, viz.: forging a check and intent to defraud a person by offering such a forged check.

People v. Altman, 147 N. Y. 473.

What indictment for perjury in making and filing an affidavit must be alleged and what must be proved on trial.

People v. Williams, 149 N. Y. 1.

Indictment—Continued.

An indictment for false pretenses is sufficient if it states and negatives one false pretense.

People v. Peckens, 153 N. Y. 576.

An indictment for obtaining a deed by false pretenses which gives a description of the premises and states the consideration, the names of the grantor and grantee and the value of the deed, sets out the deed sufficiently.

Id.

A statement that the land was of a certain value is a sufficient allegation of the value of the deed.

Id.

An indictment may, notwithstanding section 29 of the Penal Code, state facts.

Id.

The principal fact must be charged in the indictment.

People v. Albow, 140 N. Y. 130.

The forging and uttering of the same instrument may be charged in separate counts in an indictment.

People v. Alder, 140 N. Y. 331.

Where an indictment charges the presentation of false proofs of loss knowingly it is sufficient.

People v. Spiegel, 143 N. Y. 107.

Surplusage no more vitiates an indictment than a pleading in a civil action.

People v. Lawrence, 137 N. Y. 517.

It seems that an indictment for larceny under Penal Code (§ 528) is sufficient, if without setting forth the false pretenses it charges felony in the form used in common-law indictments.

Id.

It seems that under Code Criminal Procedure (§§ 278, 279), requiring an indictment to charge but one crime and but in one form, the two offenses of forgery and uttering the forged instrument cannot be properly united in one count in the same indictment.

People v. Tower, 135 N. Y. 457.

The proper and only remedy for such misjoinder is by demurrer.

Id.

Allegations in a common-law action in an indictment for murder, held sufficient to sustain a conviction for murder in the first degree.

People v. Constantino, 153 N. Y. 24.

Within what time an indictment for seduction may be filed.

People v. Nelson, 153 N. Y. 90.

When separate counts for burglary, larceny and receiving stolen goods may be joined in one indictment.

People v. Wilson, 151 N. Y. 403.

An indictment for libel is defective which fails to allege the manner of publications.

People v. Stark, 136 N. Y. 538.

It seems that if the libel charged consisted of a newspaper publication, it would be sufficient to allege that it was published in a designated paper having a circulation in the county in which the indictment is found.

Id.

An indictment for murder in the common-law form is proper.

People v. Osmond, 138 N. Y. 80.

Indictment—Continued.

An indictment charging a crime in different counts that it was committed in a different manner, not demurrable under Code Criminal Procedure (§ 279).

People v. Rice, affirmed on opinion, 128 N. Y. 649.

What indictment which stated the acts constituting the crime is not demurrable for failure to conform to Code Criminal Procedure (§§ 275, 276). *Id.*

An indictment for grand larceny held sufficient. *Id.*

The rules that an indictment is good as against a general demurrer if any count be good, applied. *Id.*

Indorsement; See Bills and Notes.**Infant; See Guardian and Ward; Guardian ad Litem; Parent and Child.**

Property of infant remainderman cannot be mortgaged by trustee by order of court. *Losey v. Stanley*, 147 N. Y. 560.

Such mortgage may be collaterally assailed for want of jurisdiction in an action to foreclose it. *Id.*

A girl nine and a half years old cannot be held as a matter of law *non sui juris*.

McGrell v. Buffalo Office Building Co., 153 N. Y. 265.

When service of process on an infant defendant is not essential to the jurisdiction of a Federal court.

Sloane v. Martin, 145 N. Y. 524.

Where the guardian of infants acquiesces in the continued occupation of their premises by their mother without any agreement as to rent, the mother is not liable for use and occupation.

Lamb v. Lamb, 146 N. Y. 317.

An infant may become interested in business as a general partner.

Continental Nat. Bk. v. Strauss, 137 N. Y. 148.

Notice in some form to an infant is essential to confer jurisdiction upon a court to bind his property; the legislature may prescribe that it be constructive. *Smith v. Reid*, 134 N. Y. 568.

When court will not acquire jurisdiction of an infant by service of process on a guardian *ad litem* under Code Civil Procedure (§ 473). *Id.*

A special act authorizing the sale of contingent interests in real property of certain infants and persons not in being is constitutional. *Field v. Dessar*, 131 N. Y. 184.

The surety of a special guardian to sell interest of infant's devisees is liable for the misappropriation of such property.

Long v. Long, 142 N. Y. 545.

A special guardian for sale of infant's real estate is subject only to the jurisdiction appointing him. *Id.*

The acceptance of the accounts of general guardian is not necessarily a ratification of those of a special guardian. *Id.*

Injunction; *See Equity; Taxpayer's Action; and for injunctions in particular actions, see appropriate titles.*

- I. ISSUING AND EFFECT.
- II. RESTRAINING PROCEEDINGS AT LAW.
- III. AGAINST CORPORATIONS AND PUBLIC OFFICES.
- IV. IN OTHER CASES.
- V. PRACTICE AND UNDERTAKING.

I. ISSUING AND EFFECT.

Mere apprehension of some future wrongful acts which may be injurious to the plaintiff is not sufficient ground for a final injunction.

Reynolds v. Everett, 144 N. Y. 189.

Where the acts complained of have ceased prior to the trial a denial of a final injunction is discretionary. *Id.*

Injury to business by reason of obstruction on highway ground for injunction to restrain nuisance.

Buchholz v. N. Y., L. E. & W. R. R. Co., 148 N. Y. 640.

Party notified that his house entrenches on highway, upon proof to the contrary may maintain injunction to restrain interference.

Flood v. Van Wormer, 147 N. Y. 284.

The remedy by injunction will not be granted where it will operate inequitably or contrary to the real justice of the case.

Rogers v. O'Brien, 153 N. Y. 357.

Where the premises are in the possession of the tenant who wastes water, the landlord cannot procure an injunction to prevent the cutting off of the supply for failure to pay special rates.

Brass v. Rathbone, 153 N. Y. 435.

Equity courts can provide that a title to the easements required shall be conveyed as a condition to giving the relief demanded.

Galway v. Metropolitan El. R. R. Co., 128 N. Y. 132.

A court of equity should not restrain a party from doing what it has no power to protect that party from being compelled by another court to do.

Mahr v. Norwich Union Fire Ins. Co., 127 N. Y. 452.

An equity court is not bound to issue an injunction for the purpose of protecting a technical right.

Gray v. Manhattan Ry. Co., 128 N. Y. 499.

Equity will enforce a valid contract although it happened to be by parol.

Lewis v. Gollner, 129 N. Y. 227.

Although the contract is a personal one equity will protect its terms. *Id.*

Injunction will issue to restrain interference with acquired rights.

Pocantes Water Works Co. v. Bird, 130 N. Y. 249.

The scope of the injunction is limited to protecting those rights. *Id.*

Injunction—Continued.

It seems that if the injunction is void as being beyond the jurisdiction of the court, a submission to its restraint is voluntary.

Mark v. Hyatt, 135 N. Y. 306.

When there is an absence of proof of substantial damage and refusal to grant, an injunction will not be disturbed on appeal.

Wormer v. Brown, 149 N. Y. 163.

Provision of Code Civil Procedure (§ 608), that an injunction order may be granted to accompany the summons, does not refer solely to an injunction granted under Code Civil Procedure (§ 603), but is unlimited in its terms; what must be shown.

People ex rel. Caruffman v. Van Buren, 136 N. Y. 252.

An action to restrain the creation of a cloud upon title by the sale and giving of a lease upon such sale for non-payment of an assessment upon lands in the city of New York, which is alleged to be void, is prohibited by section 879 of the Consolidation Act.

Scudder v. Mayor, 146 N. Y. 245.

II. RESTRAINING PROCEEDINGS AT LAW.

An injunction order is within the jurisdiction of the judge granting it, and will sustain proceedings to punish for contempt even though the plaintiff's attachment had not been levied at the time it was issued.

People ex rel. Caruffman v. Van Buren, 136 N. Y. 252.

A subsequent action cannot be maintained to restrain the prosecution of an earlier action in the same court unless it clearly appears that full and complete justice cannot be obtained in the earlier one.

Pond v. Harwood, 139 N. Y. 111.

The grant of a temporary injunction is usually discretionary. *Id.* Only when other remedies are inadequate can equity be used to restrain pending actions.

Norfolk and New Brunswick Hosiery Co. v. Arnold, 143 N. Y. 265.

The Supreme Court may restrain an action pending in a lower court until the determination of an action before it. *Id.*

The execution of a testamentary power of sale will not be enjoined where the election to take the land as such is not concurred in by all of the beneficiaries.

McDonald v. O'Hara, 144 N. Y. 566.

Where the parties to an action in a Federal court are all residents of the state, a state court may act *in personam* and restrain them from proceeding in such action.

Stevens v. Central National Bk., 144 N. Y. 50.

Where it appears by the complaint that the plaintiff is entitled to equitable relief, by way of restraint of some act, the granting of an injunction *pendente lite* is discretionary.

Castoriano v. Dupe, 145 N. Y. 250.

When an action in equity is proper to have a bill of sale, absolute

Injunction—*Continued.*

on its face, declared a mere collateral security for a debt, and to redeem therefrom, and the court may grant an injunction *pendente lite*. *Id.*

III. AGAINST CORPORATIONS AND PUBLIC OFFICERS.

When injunction lies to restrain public officer from doing an illegal act which he has been directed to do by a superior body.

William v. Boynton, 147 N. Y. 426.

Where the maintenance of railroad has been enjoined the defendant cannot of right demand the dissolution of the injunction upon the acquisition of the property.

Lawrence v. Metropolitan El. Ry. Co., affirmed, 126 N. Y. 483.

When a municipal corporation discharges, or threatens to discharge, sewage on private lands, the owner is entitled to restrain the injury committed.

N. Y. Central, etc., R. R. Co. v. City of Rochester, 127 N. Y. 591.

The performance of the condition precedent to the liability of a corporate stockholder may be excused through the issuance of an injunction by Supreme Court.

Hunting v. Blun, 143 N. Y. 511.

When an action cannot be maintained by the attorney-general against an incorporated gas company to restrain it from opening city streets and laying pipes.

People v. Equity Gas Light Co., 141 N. Y. 232.

Mere proof that an assessment is illegal does not require issuance of injunction.

Postal Telegraph Cable Co. v. Grant, appeal dismissed, 128 N. Y. 633.

The doctrine of *Campbell v. Seaman*, 63 N. Y. 568, reiterated in support of an injunction against an elevated railroad as it was the only adequate remedy.

Knox v. Metropolitan Elevated R. R. Co., affirmed without opinion in 128 N. Y. 625.

An attaching creditor may bring an action against the sheriff, who has levied upon the defendant's property under executions upon prior judgments alleged to have been fraudulently confessed, and the execution creditors, and in such action obtain an injunction restraining the enforcement of such executions until the final determination of his action.

People ex rel. Cauffman v. Van Buren, 136 N. Y. 252.

It seems that the action would not lie if executions had not been issued upon the alleged fraudulent judgments. *Id.*

An action will not lie to enjoin a sheriff from executing a warrant for the collection of a tax issued by the state comptroller, on the ground that the act under which the tax is levied was unconstitutional.

United Lines Telegraph Co. v. Grant, 137 N. Y. 7.

Injunction—Continued.

The action cannot be sustained on the ground that the terms of the statute have been departed from, and the assessment not lawfully or legally made, as *certiorari* is the proper remedy.

Id.

Servants and agents of a defendant restrained by injunction are bound after service on them of the orders, and may be punished for contempt.

Daly v. Amberg, 126 N. Y. 490.

Disobedience of an injunction order cannot be justified by showing that it was erroneously granted or irregularly served.

Id.

Where injunction against elevated railroad improperly enjoined the occupation of the street and directed the removal of the part encroaching.

Adler v. Metropolitan El. Ry. Co., 138 N. Y. 173.

Where the use of a similar corporate name does not cause deception or confusion, such use will not be restrained.

Hygeia Water Ice Co. v. N. Y. Hygeia Ice Co., 140 N. Y. 94.

IV. IN OTHER CASES.

An action will lie to restrain the defendant from erecting the wall of a building so as to encroach on plaintiff's land.

Baron v. Korn, 127 N. Y. 224.

The objection that the plaintiff should first establish his title to the *locus in quo* by an action at law must at least be raised by answer.

Id.

When an action to set aside mortgages brought before the appointment of a receiver for the plaintiff should be stayed.

Brower v. Baucus, affirmed without opinion, 128 N. Y. 621.

When injunction will not lie to restrain publication of picture and name in book.

Munro v. Smith, affirmed, *it seems*, without opinion, 128 N. Y. 680.

The condition to avoid an injunction may be rejected by the defendant, though if he accepts it he cannot challenge its validity.

Lawrence v. Metropolitan El. R. R. Co., affirmed, 136 N. Y. 483.

When a condition was imposed in the exercise of discretion, it cannot be questioned.

Id.

Where there is no real resemblance in the name and appearance of two publications, and no deception practiced, an injunction will be refused.

Munro v. Towsey, 129 N. Y. 38.

Injunction asked for by a landlord against a tenant's use of the premises for receiving and forwarding money to bet on horse-races, where no damage to plaintiff was alleged and the constitutionality of Laws 1887, chapter 479, was involved, was improvidently granted pending suit.

De Lacey v. Adams, appeal dismissed, 138 N. Y. 656.

Section 20 of the General Corporation Act of 1892 (L. 1892, c.

Injunction—Continued.

687) only requires the use of the books of the company in determining the rights of stockholders to vote at an election of officers, if they can be found. Force of injunction against use of new stock book considered.

Matter of Argus Co., 138 N. Y. 557.

Reconstruction of an abated nuisance may be enjoined.

Board of Health of Yonkers v. Copcutt, 140 N. Y. 12.

When the fact that promoters of a plan to erect a statue to a deceased woman are not acquainted with her is not ground for injunction.

Schuyler v. Curtis, 147 N. Y. 434.

Consent of relatives is not necessary, and an injunction will not lie because of failure to procure it.

Id.

Though relatives' feelings may be injured by the erection of the statue an injunction will not ordinarily lie.

Id.

It is not proper to consider what the feelings of the deceased would be if she were living.

Id.

Although misstatements occur in a circular in relation to such a work, an injunction will not lie where it is shown that the error was not intentional.

Id.

Place where a statue is to be put if not wholly inappropriate is not ground for injunction.

Id.

Neither will an injunction lie when it is claimed that the likeness is not to be actual but idealized.

Id.

An agreement not to carry on business in a certain locality for a certain time may be enforced by injunction.

Francisco v. Smith, 143 N. Y. 488.

Where husband and wife are seized of an estate as tenants by an entirety, and when in a proceeding to condemn a right of way the husband alone is served, the wife may restrain the construction of a sewer across the property.

Grosser v. City of Rochester, 148 N. Y. 235.

V. PRACTICE AND UNDERTAKING.

An injunction will be dissolved where it appears that the plaintiff upon the facts stated is not entitled to final relief.

Young v. Rondout & Kingston Gas Light Company, 129 N. Y. 57.

In order to secure an injunction for carrying on an unlawful business, the complainant must show special damage.

Cranford v. Tyrrell, 128 N. Y. 341.

The fact that person maintaining the nuisance is amenable to the criminal law is not a defense.

Id.

Nor is the objection that the nuisance is a common one when special damage was suffered.

Id.

Injunction against defendant, restraining him from keeping a house of ill-fame, granted.

Id.

Injunction—Continued.

In an action to restrain a publisher from publishing his works, an author need not show the existence of a copyright.

Salters v. Balford Co., 133 N. Y. 499.

Where a party has alleged full performance on his part, he cannot claim that a contract had been abrogated. *Id.*

Damages in case of factory, the operation of which was restrained by an injunction afterward set aside, considered and determined.

Manufacturers and Traders' Bk. v. C. W. F. Dare Co., affirmed without opinion in 138 N. Y. 635.

Where plaintiff obtains an injunction on a verified complaint and not on affidavits, his right to the relief depends upon the establishment judicially of the rights pleaded as the cause of action, and a dismissal of the complaint for lack of prosecution is a final decision within Code Civil Procedure (§ 620). *Id.*

A dismissal of the plaintiff's complaint and dissolution of an injunction order, as a punishment for the plaintiff's contempt in interfering with the execution of a commission, is not an adjudication that plaintiff was not entitled to the injunction at the commencement of the action.

Appolinaris Co. v. Venable, 136 N. Y. 46.

An injunction which, although erroneous, is within the jurisdiction of the court, will not, upon being reversed on appeal, form the basis of an action for damages in the absence of an undertaking, except upon a claim of malicious prosecution.

Mark v. Hyatt, 135 N. Y. 306.

An action to enjoin the threatened removal of fixtures by a tenant is defeated by a finding that the threats were not in fact made.

Loeser v. Liebman, 137 N. Y. 163.

It seems that an action, by one claiming to own the fee of a road, to enjoin the town authorities from working a highway thereon, on the ground that the plaintiff's grant to the town was absolutely void, may be dismissed upon the ground that the plaintiff has an adequate remedy at law.

Hughes v. Bingham, 135 N. Y. 347.

In an action by an assignee of a lease to redeem from a forfeiture thereof after a re-entry by the landlord, a temporary injunction restraining the landlord from removing from the premises personal property placed thereon by the tenant should not be granted.

Koehler & Co. v. Brady, 144 N. Y. 135.

Injury Causing Death ; *See Death by Negligence.*

Insane Persons.

Execution of a deed by an insane person is absolutely void.

Aldrich v. Bailey, 132 N. Y. 85.

In proceedings to inquire into an alleged idiocy, it is not necessary

Insane Persons—Continued.

that the alleged idiot should have notice of the application for the commission.

Gridley v. College of St. Francis Xavier, 137 N. Y. 327.

Where such proceedings are instituted in a court of general jurisdiction, it may be presumed, when the proceedings are attacked collaterally, that all proper notices were served upon the idiot.

Id.

Where intention is not necessary an insane person is liable for his tort.

Williams v. Hayes, 143 N. Y. 442.

Upon an application to supersede a commission of lunacy the manner in which the court will ascertain whether the lunatic has become sane is in its discretion.

Matter of Blewitt, 138 N. Y. 148.

The fact of lunacy must be ascertained judicially.

Matter of Blewitt, 131 N. Y. 541.

A clear case should be made before the court proceeds in the absence of due notice.

Id.

A lunatic whose lunacy has been judicially determined, and for whom a committee has been appointed, is incapable of making any contract.

Carter v. Beckwith, 128 N. Y. 312.

The death of the lunatic terminates the commission and the special jurisdiction of the court ceases. All claims are to be settled in the administration.

Id.

Attorney requested by an adjudged lunatic to supersede the commission, when it appears proceeding was instituted in good faith, has a valid claim against the estate of the lunatic.

Id.

Discretion of court upon the application of a lunatic to set aside the commission of lunacy considered.

Id.

The court has power on an application to supersede a commission of lunacy, to make reasonable costs and expenses.

Id.

The jurisdiction to award costs can only be invoked on petition or motion.

Id.

Lunacy of lessor does not affect his covenant for quiet enjoyment, but his estate for breach thereof.

Matter of Strasburger, 132 N. Y. 128.

The committee of takes no title to the lunatic's estate.

Id.

Where the lessor sub-leased and his estate was insolvent, his committee could make performance of covenant in lease.

Id.

Insanity; *See Criminal Law*; *Insane Persons*; *Lunacy*; *Wills*.

Insolvency; *See Assignment for Creditors*; *Bankruptcy*; *Corporations*; *Partnership*.

Instruments; *See Assignment*; *Cancellation*; *Contracts*; *Deeds*; *Evidence*; *Mistake*; *Mortgage*; *Reformation of Instruments*.

Insurance.

- I. GENERAL PRINCIPLES.
- II. FIRE INSURANCE.
- III. LIFE INSURANCE.
- IV. ACCIDENT INSURANCE.
- V. MARINE INSURANCE.
- VI. INSURANCE COMPANIES.

I. GENERAL PRINCIPLES.

Statement by an attending physician as to diseases for which he treated an insured is admissible under section 834 of the Code.

Redmond v. Industrial Benefit Ass'n, 150 N. Y. 167.

The insured is charged with a knowledge of extent of agent's authority.

Conway v. Phoenix Mut. Life Ins. Co., 140 N. Y. 79.

Acceptance of premium after due date is conditioned upon the good health of the insured. *Id.*

What constitutes waiver of conditions by general agents although policy contains restrictive provisions.

Wood v. American Fire Ins. Co., 149 N. Y. 382.

What is not a violation of clause avoiding the policy in case a business ceases to be operated for a certain length of time.

Ladd v. Aetna Ins. Co., 147 N. Y. 478.

The policy stipulations relating to procedure after a loss are to be reasonably construed.

Paltrovitch v. Phoenix Ins. Co., 143 N. Y. 73.

Return of proofs without objection after a month is a waiver of any defect in procedure. *Id.*

What constitutes waiver of forfeiture of incumbrance of a severally valued policy.

Kiernan v. Dutchess Co. Mutual Ins. Co., 150 N. Y. 190.

When the court is justified in setting aside an appraisal where it appears that assured was induced to accept appraiser by false statement. *Id.*

It is not admissible to prove the evidence of an agent of an insurer as to his meaning of ambiguous words.

Rickerson v. Hartford Fire Ins. Co., 149 N. Y. 307.

A custom of insurer in describing property unless known to insured is not binding on him. *Id.*

Stocks of New York banks held by a foreign insurance company doing business in this state are exempt from taxation by force of section 4 of chapter 679, Laws 1886.

Aetna Ins. Co. v. Mayor, 153 N. Y. 331.

Chapter 679 of 1886, exempting bank stock held by foreign insurance companies doing business in this state from taxation, did not apply to the taxation for the year 1896. *Id.*

Insurance—Continued.

Where application and answers are part of contract, a false answer is breach of contract.

Clemans v. Supreme Assembly Royal Society of Good Fellows, 131 N. Y. 485.

Mere knowledge of the agent that the warranty was false does not prevent the breach being set up as a defense. *Id.*

Fraudulent concealment of the fact of rejection by the agent would prevent availability of such defense. *Id.*

Where the evidence of fraud is contradictory the court will not on appeal draw inference of fraud to support a judgment. *Id.*

An administratrix can recover on the vested interest of a minor in a policy.

Walsh v. Mut. Life Ins. Co., 133 N. Y. 408.

The rules governing the vesting of estates created by will do not govern the construction of an insurance policy. *Id.*

Business usage may be established to reveal purpose of a policy.

Petrie v. Phoenix Ins. Co., 132 N. Y. 137.

Where a condition is of the essence, the exercise of authority without compliance thereto is null.

Quinlan v. Providence Washington Ins. Co., 133 N. Y. 356.

Knowledge of limited authority and that an act transcends it releases the principal from liability. *Id.*

Insurable interest of owner of land who has incompleated buildings in course of construction, considered.

Foley v. Manufacturers & Builders' Fire Ins. Co., 152 N. Y. 131.

Acceptance of policy with knowledge of all facts acts as estoppel.

Cross v. Nat. Fire Ins. Co., 132 N. Y. 133.

An agent having unrestricted authority may bind his principal by a preliminary parol contract to issue a policy.

More v. N. Y. Bowers Fire Ins. Co., 130 N. Y. 537.

Otherwise, where the agent to the knowledge of applicant has no power to contract. *Id.*

Failure to respond to an application does not raise inference of its acceptance. *Id.*

Silence operates as an assent and creates an estoppel only when it has the effect to mislead. *Id.*

In the absence of any agreement waiver of forfeiture may result from acts or conduct of parties.

Ronald v. Mut. Reserve Fund Life Assoc., 132 N. Y. 378.

In the absence of an estoppel knowledge of the facts and an intention to waive must exist. *Id.*

The elements of estoppel must exist in the forfeiture where there is no express waiver.

Armstrong v. Agricultural Ins. Co., 130 N. Y. 560.

The assured must have been misled by some act on part of the company. *Id.*

Insurance—Continued.

- Failure to answer letter asking for consent to foreclose, after proceedings had been commenced, is not waiver. *Id.*
 Omission to assert the forfeiture when declining to accept proofs is not waiver. *Id.*
 Where refusal to pay is based upon forfeiture, defective proofs cannot be used as a defense. *Id.*
 If the company accepted proofs without objection it cannot deny that plaintiff was the assured. *Id.*
 If the company recognizes the validity of the policy after knowledge of forfeiture, it is estopped. *Id.*

II. FIRE INSURANCE.

- The fact that an appraisal is not made as provided in the policy is no defense to an action for the amount of loss.
Bishop v. Agricultural Ins. Co., 130 N. Y. 488.
 What knowledge of insurance agent of chattel mortgage waives condition against incumbrance.
Robbins v. Springfield Fire & Marine Ins. Co., 149 N. Y. 477.
 A provision in a policy that issues be referred on demand of the insurer is a nullity.
Sanford v. Commercial Travellers' Mut. Accident Ass'n, 147 N. Y. 326.
 Meaning favorable to insured should be given where description of property is ambiguous.
Rickerson v. Hartford Fire Ins. Co., 149 N. Y. 307.
 A policy holder stating upon information the cost of the fire is not estopped from later showing the facts of the difference.
White v. Royal Ins. Co., 149 N. Y. 485.
 Delivery of a policy to the agent of the company with a request for its cancellation, is sufficient to terminate the risk from that time.
Crown Point Iron Co. v. Aetna Ins. Co., 127 N. Y. 608.
 Where policy is sent by mail to an agent of the insurer, the policy is not terminated until actually in his hands. Loss in meantime falls on insurer. *Id.*
 Forfeiture clause for failure to give notice of damage, *held*, not to apply to an omission of some particular article from the notice, but only to delay.
Martin v. Manufacturers' Accident Indemnity Co., 151 N. Y. 94.
 Retention by the company of a notice of injury without objection is a waiver of any such objection. *Id.*
 A receipt in "full satisfaction, etc.," *held*, to relate to the surrender only of the claim. *Id.*
 The interest of a mortgagee in real property may be insured.
Weed v. Hamburg-Bremen Fire Ins. Co., 133 N. Y. 394.
 Such a policy is valid though no particular person is named as insured. *Id.*

Insurance—Continued.

Failure of mortgagee to state that a judgment of foreclosure had been obtained is not suppression of a material circumstance.

Id.

Retention of proof of loss is waiver of preliminary notice.

Id.

Objection as to sufficiency of persons executing proofs should be made at the trial.

Id.

When a subsequent notice that an application for renewal is declined is not effectual as a cancellation of a binding slip given in renewal of a policy of insurance.

Van Tassel v. Greenwich Ins. Co., 151 N. Y. 130.

The rights of the assured under such binding slips are not waived by a limitation in such demand to the amount of the offer.

Id.

A general agent having power to make an indorsement to the consent of the transfer of interest has full authority to make a preliminary contract to do so.

Id.

When the general agent makes an oral agreement with the transferee of the property and policy to go where the latter is kept by a third person and make the required indorsement, but fails to do so, the transferee may recover the amount of the insurance as damages for the breach of such agreement in case of loss.

Id.

A tenant in actual possession under an oral agreement to keep the premises insured has an insurable interest.

Cross v. Nat. Fire Ins. Co., 132 N. Y. 133.

The insurer may not, without the concurrence of the mortgagee, effect an accord and satisfaction without the assent of the latter, where the policy is by its terms payable to the mortgagee.

Hathaway v. Orient Ins. Co., 134 N. Y. 409.

A condition against other insurance in a fire policy is violated by the taking out of further insurance without the knowledge of the company, and such violation is not waived by a mere verbal communication to an agent of the company of the fact that such insurance has been procured.

Baumgartel v. Providence-Washington Ins. Co., 136 N. Y. 547.

The fact that the agent, when informed of the further insurance, replied that he would attend to it, which was not followed by any presentation of the policy for indorsement by the insurer, will not estop the company from claiming a forfeiture.

Id.

The recovery of a judgment against the insured, and levy of execution upon the stock of goods which is the subject of the insurance, is not a change of interest within a fire policy.

Walradt v. Phoenix Ins. Co., 136 N. Y. 375.

Such levy and the taking of possession by the sheriff will not constitute a breach of a condition against change of possession.

Id.

Cancellation, *held*, looked to the future and not to the past, and

Insurance—Continued.

did not affect a loss within the time for which the premium was retained. *Duncan v. N. Y. Mut. Ins. Co.*, 138 N. Y. 88.
At law the insurer is entitled to recover the balance of the amount insured. *Id.*

What is a good ground for setting aside an appraisal which is grossly below the actual loss sustained, and made by appraiser appointed through false statements.

Bradshaw v. Agricultural Ins. Co., 137 N. Y. 137.
A provision in the policy that the appraiser "must be competent and disinterested" does not relate solely to lack of pecuniary interest. *Id.*

Where payment to the mortgagee is collateral, a breach of the policy by insured bars a recovery by the mortgagee.

Moore v. Hanover Fire Ins. Co., 141 N. Y. 219.
Where a policy permits a recovery for damage by lightning, no damage can be recovered for injury done by a high wind immediately thereafter.

Brakes v. Phoenix Ins. Co., 143 N. Y. 402.
Where the owner and mortgagee are insured in the same policy, the latter may sell the property upon foreclosure and recover the insurance in case of loss.

Eddy v. London Assur. Corp., 143 N. Y. 311.
Provision for subrogation does not affect the right to foreclosure. *Id.*

The mortgagee's rights are not affected by the insured obtaining additional insurance without notice. *Id.*

The taking of a partner by one whose stock in trade is insured in his individual name and a transfer to such partner of an interest in the goods violates the provision of the policy against sales.

Germania Fire Ins. Co. v. Home Ins. Co., 144 N. Y. 195.
Where the insured property is transferred by a merely colorable bill of sale, it is not a violation of the condition against absolute ownership.

Forward v. Continental Ins. Co., 142 N. Y. 382.
Where such bill is executed with knowledge of the agent, the company is bound. *Id.*

A policy issued to a firm is not avoided by assignment of one partner of his interest.

Wood v. American Fire Ins. Co., 149 N. Y. 382.
When a sale of real property on execution operates to change interest, etc. *Id.*

III. LIFE INSURANCE.

In action for reformation of a policy, recovery of balance paid by mistake may be had.

Belt v. American Ins. Co., 148 N. Y. 624.

Insurance—Continued.

A waiver in an application for insurance of the provisions of section 834 of the Code is not against public policy.

Foley v. Royal Arcanum, 151 N. Y. 196.

When defense that insured died from intemperance is proven.

Hanna v. Connecticut Mut. Life Ins. Co., 150 N. Y. 526.

Drowning is a death from external violence within the meaning of that term in an accident policy.

Wehle v. United States Mutual Accident Ass'n, 153 N. Y. 116.

A provision in an accident policy giving medical adviser of insurer right to examine body of insured with respect to injury for cause of death must be availed of as soon as possible.

Id.

Misstatements in the application as to freedom from catarrh constitutes a breach of warranty

Bancroft v. Home Benefit Asso., affirmed without opinion, 126 N. Y. 682.

When action by insured to redeem and for reassignment of policy will lie.

Bohleber v. Waelden, 150 N. Y. 405.

Where the cause of death might have originated after issuance of policy the question is for the jury.

Tucker v. United Life & Accident Ins. Co., 133 N. Y. 548.

Though a statement in the policy varies from that made by the insured, the full amount may be recovered.

Berry v. Am. Central Ins. Co., 132 N. Y. 49.

Conditional acceptance of payment is not a waiver of forfeiture.

Ronald v. Mut. Res. Fund Life Assoc., 132 N. Y. 378.

Furnishing of blanks by an agent is not waiver of forfeiture. *Id.*

Mutual benefit associations of a co-operative form are not subject to provisions requiring previous notice of the date of annual dues.

Id.

A statement tending to prove an answer untrue is evidence to be considered by the jury.

Helwig v. Mut. Life Ins. Co., 132 N. Y. 331.

The court should adopt that construction which it thinks the insurer had reason to suppose was understood by the insured.

Wadsworth v. Jewelers & Tradesmen's Co., 132 N. Y. 540.

The notice of forfeiture of a life policy, under Laws 1877, chapter 321, amending Laws 1876, chapter 341, need not follow the precise language of the statute.

McDougall v. Provident Savings Life Assurance Soc., 135 N. Y. 551.

Whether the statute applies in the case of a life policy for a term of one year, with a provision for renewal upon making a stipulated payment before expiration,—*quære*.

Id.

When burden of proof is on the plaintiff and a charge to the contrary is erroneous.

Whitlatch v. Fidelity & Casualty Co., 149 N. Y. 45.

Insurance—Continued.

Facts which established a course of dealing under which policy could not be declared void for non-payment of dividends.

Hastings v. Brooklyn Life Ins. Co., 138 N. Y. 473.

Where a witness testified to a conversation between the secretary of the company and the insured, in which the former promised to carry the insurance, the question of waiver should have been submitted to the jury. *Id.*

It is competent for the parties to a life insurance contract to subsequently modify its terms with respect to the time of payment of premiums, when such agreement may be presumed.

De Prece v. National Life Ins. Co., 136 N. Y. 144.

When the insurer loses the right to insist upon a forfeiture on account of failure of strict compliance with a notice to pay a premium when due. *Id.*

A reserve fund from which death claims were to be paid is in the nature of a trust fund.

Matter of Equitable Reserve Fund Life Assoc., 131 N. Y. 354.

A provision of the constitution permitting use of reserve fund in event of emergency is annulled by dissolution of association. *Id.*

The fund should be distributed as from date of proceedings for dissolution among the members then living *pro rata*. *Id.*

The two funds should pay *pro rata* the expenses of winding up. *Id.*

The holders of death claims must have their *status* defined as of date of commencement of dissolution proceedings. *Id.*

Proof held substantial compliance with the requirements of a policy which provided for the certificate of a magistrate if required, although that certificate was not then but was afterward furnished. *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389.

The certificate being called for by the company, delay occasioned by the acts of several magistrates successively applied to and while there were pending negotiations for a settlement of the claim, is not sufficient as matter of law to defeat the claim of the insured. *Id.*

When a policy is issued with full knowledge on the part of the underwriter of facts in conflict with the statement in the application, it may be assumed there was no intention to insist upon the condition. *Id.*

A company having returned the proofs of loss without objecting to a breach of warranty but to correct certain irregularities, the jury might find a waiver of the condition as to occupancy. *Id.*

A mortgagee's authority to insert the statement not being shown, nor any ratification by the insured appearing, it might have been found that it was inserted by mistake. *Id.*

A statement by a beneficiary in the proofs of death is competent evidence against her of that fact.

Spencer v. Citizens' Mut. Life Ins. Assoc., 142 N. Y. 505.

Insurance—Continued.

Where notice of premium due is given, no further notice is required. *Conway v. Phoenix Mut. Life Ins. Co.*, 140 N. Y. 79. Conditions subsequent in a policy should be literally construed in favor of the beneficiary.

Trippe v. Provident Fund Society, 140 N. Y. 23.

When parol agreement by the beneficiary of an insurance policy with the insured to expend a certain portion of the proceeds is valid and creates a trust. *Hirsh v. Auer*, 146 N. Y. 13.

When foreign administrator has duly commenced an action upon an insurance policy found in that state by service on an agent of the company, the courts of this state should refuse to entertain jurisdiction of a subsequent action.

Sulz v. Mutual Reserve Fund Life Ass'n, 145 N. Y. 563.

Statement of a deceased who was insured, in his application for insurance, is not falsified by statement of the physician as to cause of death.

Redmond v. Industrial Benefit Ass'n, 150 N. Y. 167.

Payment of a claim out "of the pool then forming," construed. *Id.*

A provision in a policy that will not cover death arising from anything accidentally taken, administered or inhaled, does not exempt their liability from death, caused from involuntarily inhaling gas.

Menneiley v. Employers' Liability Assurance Corp., 148 N. Y. 596.

A provision excepting company from liability for death "from accidents that shall bear no external or visible marks," construed. *Id.*

A policy insuring the life of a father, in consideration of premiums payable by his son, which is made payable to the "assured" on the proof of death of the "person whose life is hereby insured," construed. *Cyrenius v. Mutual Life Ins. Co.*, 145 N. Y. 576.

Prior to chapter 248 of 1879, the assignment by a married woman of a policy for her benefit was void.

Miller v. Campbell, 140 N. Y. 457.

Upon the maturity of an endowment policy a prior assignment executed by husband and wife may become operative. *Id.*

Chapter 248 of 1879 gives the wife a right to assign a policy in which she is the beneficiary. *Id.*

IV. ACCIDENT INSURANCE.

Voluntary exposure to unnecessary danger prevents recovery under an accident policy.

Williams v. U. S. Mut. Accident Assoc., 133 N. Y. 366.

Provision requiring notice of injury, etc., to be made within ten days refers to the time after discovery of injury of body of the person injured.

Trippe v. Provident Fund Society, 140 N. Y. 23.

Insurance—*Continued.*

Receiving and retaining proofs without objection is a waiver of any defects. *Id.*

V. MARINE INSURANCE.

The personal liability of the master does not destroy a lien previously acquired.

Cassa Maritima v. Phoenix Ins. Co., 129 N. Y. 490.

Where a marine policy excepts losses caused by ice, the insurer does not become liable for loss arising from the excepted cause nor estopped from setting up the exception as a defense, by taking possession of the cargo after the loss and disposing of it for the benefit of the insured.

Schwuyler v. Phoenix Ins. Co., 134 N. Y. 345.

The insured was entitled to demand the unearned premium only upon the arrival of the vessel at its destination, and then only was the insured bound to make the cancellation, and there was a mistake of fact which entitled the insured to have the cancellation rescinded.

Duncan v. N. Y. Mut. Ins. Co., 138 N. Y. 88.

The grounding of a boat by ebbing of the tide is covered in the risk.

Petrie v. Phoenix Ins. Co., 132 N. Y. 137.

Where a boat caught fire from the cargo and sunk in a stream, the loss is by fire. *Singleton v. Phoenix Ins. Co.*, 132 N. Y. 298.

Where there is sufficient evidence it is error not to submit a fact to the jury. *Id.*

An inference of unseaworthiness cannot be deduced where no defects are found and but one inch of water in the hold. *Id.*

Contracts of marine insurance are to be liberally construed.

Duncan v. China Mut. Ins. Co., 129 N. Y. 237.

The terms of a policy will be applied to the interest of the party for whose benefit it was intended. *Id.*

A person who has an interest in the property insured will be protected. *Id.*

Though he had no interest at commencement of risk, providing he was intending to be insured, a person in whose name a policy is made is trustee of an express trust. *Id.*

Where there are two policies the terms of each pertinent to the risk should be considered.

Phoenix Ins. Co. v. Parsons, 129 N. Y. 86.

Failure to perform a condition acts as estoppel. *Id.*

Claim for commissions for procuring a charter for a vessel is a personal liability of the owner. *Id.*

Where a policy contained a warranty as to registered tonnage, the register under which the ship sailed is referred to.

Reck v. Phoenix Ins. Co., 130 N. Y. 160.

Where the ship is a foreign one, the system of measurements under acts of Congress do not apply. *Id.*

Insurance—Continued.

The issuance of a policy at a port prohibited in the warranty waives breach of warranty. *Id.*

VI. INSURANCE COMPANIES.

Chapter 248 of 1879, allowing wives to assign policies with consent of husband, applies to policies of foreign companies within the state. *Spencer v. Myers*, 150 N. Y. 269.

The deposit made by a foreign insurance company is a trust fund for benefit of resident policy-holders.

Lancashire Ins. Co. v. Maxwell, 131 N. Y. 286.

These funds are impressed with the special trust provided by statute, and the court has no power to direct their withdrawal. *Id.*

The officers of a county co-operative insurance company have the same power to waive defects or to ratify invalid policies as officers in a stock insurance company.

Pratt v. Dwelling House Mut. Fire Ins. Co., 130 N. Y. 206.

One who is an officer and agent of a company cannot make a valid contract for the insurance of his property by his own act. *Id.*

He has no right to approve his own application for a policy in the company. *Id.*

Such officer may make an application, and if accepted the company is bound thereby. *Id.*

Directors may ratify the issuance of a policy. *Id.*

Acceptance of report including the issuance of such policy is ratification thereof. *Id.*

A company takes the risk of the notice of mortality assessments reaching a policy-holder.

Merriman v. Keystone Mut. Benefit Asso., 138 N. Y. 116.

The provisions of Laws 1877, chapter 321, regarding the mailing of notices applied only to premiums or interest payable at stated intervals. *Id.*

The provisions of Laws 1893, chapter 175, for the incorporation of co-operative or assessment insurance societies contemplate only adult persons as entitled to membership, and do not authorize the issuance of certificates to infants.

Matter of Globe Mutual Benefit Asso., 135 N. Y. 280.

Contract whereby one insurance company agreed to reinsure another to the extent of one-half of each and every risk which equaled or exceeded in value a sum specified, and limited the liability to the actual market value of the goods at the date of loss, construed.

Continental Ins. Co. v. Aetna Ins. Co., 138 N. Y. 16.

Case in which held that facts could not maintain an action upon the reinsurance, since the agents, being invested with dis-

Insurance—Continued.

cretionary powers by each company, could not make a contract between them.

Empire State Ins. Co. v. Am. Central Ins. Co., 138 N. Y. 446.

The directors of a mutual benefit society have no power to authorize the use of its reserve fund for the payment of notes issued by it. *McClure v. Levy*, 147 N. Y. 215.

A mutual benefit society, organized to furnish substantial aid to "the families or assigns" of its members, in the event of death, issued a certificate payable to the "legal representatives" of a member upon his application designating as beneficiary "my estate." *Held*, that the certificate was payable to the executors or administrators, and that the widow of the member, as such, could not maintain an action thereon.

Sultz v. Mutual Reserve Fund Life Ass'n, 145 N. Y. 563.

The statute forbidding payment of rebates is constitutional.

People v. Formosa, 131 N. Y. 478.

Agents of foreign insurance companies are not exempt from operation of statute. *Id.*

When jury was justified in finding that a foreign company was authorized to do business in this state. *Id.*

Section 76 of the Insurance Law, empowering receivers of insurance companies to take possession of the securities deposited in the insurance department construed.

People v. American Steam Boiler Ins. Co., 147 N. Y. 25.

Payment of claims from different funds considered.

People ex rel. Atty.-Gen. v. Life & Reserve Ass'n, 150 N. Y. 94.

A provision of the by-laws for the transfer of one maximum death assessment from one fund to another construed. *Id.*

Upon the dissolution of a company, death claims which had matured are payable in full first, and the death claims accruing after dissolution are to be paid *pro rata* from remainder. *Id.*

Verbal consent by an agent to foreclosure proceedings is not binding upon the company.

Moore v. Hanover Fire Ins. Co., 141 N. Y. 219.

An insurance company cannot be created for the purpose of "inspection and certification as to the sanitary conditions of buildings and premises."

People ex rel. Woodward v. Rosendale, 142 N. Y. 126.

General agents having authority to make contracts without reference to the home office have a power co-existent with that of the company. *Berry v. Am. Central Ins. Co.*, 132 N. Y. 49.

Conditions entering into the validity of a policy at its inception may be waived by agents. *Id.*

Interest ; See Legacies ; Usury.

Where defendant is enjoined from using the fund in controversy

Interest—Continued.

he cannot be charged with more interest than the money has earned. *Warren v. Banning*, 140 N. Y. 227.

In replevin for railroad bonds interest at legal rate may be recovered. *Govin v. De Miranda*, 140 N. Y. 474.

Interest may not be allowed in any case unless by virtue of some contract, express or implied.

Matter of N. Y. & Brooklyn Bridge, 137 N. Y. 95.

Where a depositor in a bank ceased to draw or to make further deposits, and was requested by the president of the bank and afterward by the cashier to withdraw his account, as the bank could no longer pay interest on deposits, interest ceased thereupon from date of notice.

McLoghlin v. Nat. Mohawk Valley Bk., 139 N. Y. 514.

The rule of computing interest upon an account by computation on the principal to such time as the payments equal or exceed the interest, and then ascertaining a new principal, approved.

Peyser v. Myers, 135 N. Y. 599.

An agreement of settlement made by a beneficiary under a will by the terms of which he was to receive interest on the trust fund created from the death of the testatrix up to the time the fund should be made up or created, relinquish all claim for accrued interest prior to the date of the agreement.

Spofford v. Pearsall, 138 N. Y. 57.

When a trustee is not chargeable with compound interest upon funds in his hands for investment.

Price v. Holman, 135 N. Y. 124.

Where a mortgage provided for the payment of \$10,000 in four equal payments, with interest at seven per cent. payable semi-annually on all sums remaining from time to time unpaid, the rate of seven per cent. regulated the sum payable upon an installment before maturity.

Ferris v. Hard, 135 N. Y. 354.

Where a portion only of a trust fund is set apart, the executors agreeing that, until the residue is set up, the *cestui que trust* shall receive "the interest to which she is in law entitled on the unpaid part of her trust legacy," she is entitled to the interest which the law allows at the times it accrues.

Stevens v. Melcher, 152 N. Y. 551.

When only a time is specified in the will for the payment of a legacy, the legacy carries interest from time it is payable.

Lyon v. Industrial School Asso., 127 N. Y. 402.

The exception in favor of minors as to whom the testator stands in *loco parentis*, does not apply in favor of a niece brought by the family of testatrix. *Id.*

Under an agreement to pay plaintiff \$3,000 "in such manner as will be acceptable to her," interest runs after demand.

Lawrence v. Church, 128 N. Y. 324.

Interest—Continued.

No separate demand is necessary in case the principal sum awarded is paid. *Devlin v. Mayor, etc., of N. Y.*, 131 N. Y. 123. After expiration of time allowed for payment the allowance of interest depends upon demand therefor. *Id.*

A debtor tendering payment must hold money ready for discharging debt to escape payment of interest after tender.

Nelson v. Loder, 132 N. Y. 288.

The same rule applies to a subsequent lienor seeking to redeem a prior security. *Id.*

J.

Joinder of Actions ; *See Pleading.*

Joinder of Parties ; *See Pleading.*

Joint Debtors.

Upon the death of one of two joint contractors the primary liability for breach rests upon the survivor.

Barnes v. Brown, 130 N. Y. 372.

Joint Liability.

Recovery against one of several tortfeasors without satisfaction is not a bar to recovery against others.

Russell v. McCall, 141 N. Y. 437.

Joint-Stock Companies ; *See Associations ; Corporations.*

Judges ; *See Constitutional Law ; Courts ; Reference.*

A decision of the General Term is invalidated where a judge who granted the order at Special Term sits in the General Term.

Van Arsdale v. King, 152 N. Y. 69.

Where a judge of the New York Superior Court designated to sit in the Supreme Court resigned after the submission of an application to appoint commissioners in condemnation proceeding but before decision thereof, and was appointed a justice in the Supreme Court, in which capacity he made the order, *held*, that he had lost jurisdiction, and the order was void.

Matter of Mayor, etc., of N. Y., 139 N. Y. 140.

The provision of Code Civil Procedure (§ 25), empowering a judge out of office to settle a case or exceptions, or make a return of proceedings, does not enable him to decide an issue on motion. *Id.*

When justice of another department, assigned by justices of the Appellate Division, has jurisdiction to hold a term by force of article 6, section 6 of the Constitution.

People v. Herrmann, 149 N. Y. 190.

Judges—Continued.

Section 12 of article 6 of the new Constitution, prohibiting the increase or diminishing of compensation of judges or justices, is not retroactive. *People ex rel. Follett v. Fitch*, 145 N. Y. 261.

Judgments; See Appeals; Creditor's Suit; Foreign Judgments; Former Adjudication; Jurisdiction; Justice's Court.

- I. FORM AND CONTENTS.
- II. EFFECT AND BAR.
- III. CONFESSION.
- IV. BY DEFAULT.
- V. LIEN.
- VI. AMENDMENT, REVERSAL, SATISFACTION.

I. FORM AND CONTENTS.

Case where *held* it was not necessary to make separate findings for the permanent damages to the fee.

McGean v. Met. El. Ry. Co., 133 N. Y. 9.

When a transfer has been made after a suit brought, judgment concludes plaintiff's grantee upon all the issues litigated. *Id.*

It seems that if the judgments entered in an action be not in pursuance of the decision, or be improper in form, the defendant, if he has an opportunity, should object thereto and then make a motion to correct it. *Simmons v. Craig*, 137 N. Y. 550.

Dating the decree on the day the court ordered it entered is proper. *Clark v. Clark*, affirmed without opinion, 138 N. Y. 653.

Where the complaint was in form for the foreclosure of a mechanic's lien, but a bond had been filed discharging the lien of record, a judgment against defendant personally was competent.

A. Hall Terra Cotta Co. v. Doyle, 133 N. Y. 603.

II. EFFECT AND BAR.

No distinction is made between judgments for sum of money on sole, joint, or joint and several contracts.

Baskin v. Huntington, 130. N. Y. 413.

Judgment against a surety on a note is enforceable against his real estate. *Id.*

A judgment against a city in its corporate name will bind the citizens and taxpayers.

Ashton v. City of Rochester, 133 N. Y. 187.

The subsequent marriage of the defendant will not estop him from questioning the right of the court of New Jersey to render the judgment for alimony. *Rigney v. Rigney*, 127 N. Y. 408.

Each state has power to regulate the procedure of its courts, and the courts of a sister state cannot give greater effect to the procedure adopted than is given to it by the courts of the state in which the judgment was recovered. *Id.*

Judgments—Continued.

The defendant's appearance in the Court of Chancery of New Jersey, in an action for divorce in obedience to a subpoena, considered. *Id.*

A judgment by confession entered in another state, valid as a judgment *in personam* in the state where judgment was entered, is valid in this state. *Teel v. Post*, 128 N. Y. 387.

It is competent for the defendant to show in such action that the power of attorney is a forgery. *Id.*

When the entry of judgment before the maturity of the note in another state if authorized will not affect the validity of the judgment here. *Id.*

A foreign judgment is conclusive upon the merits and can be impeached only by proof that the court in which it was rendered had not jurisdiction of the subject-matter of the action, or of the person of the defendant, or that it was procured by fraud.

Dunstan v. Higgins, 138 N. Y. 70.

The regularity or validity of a provision in a judgment of foreclosure not raised by a party to the suit by answer, appeal or motion, cannot be raised collaterally.

Matter of Stillwell, 139 N. Y. 337.

A judgment in *mandamus* proceedings against the board of managers of the Buffalo State Asylum for the Insane, appointed under Laws 1870, chapter 378, compelling it to adjust, determine and certify the amount due to the contractors, is not to be binding upon the state. *Peck v. State*, 137 N. Y. 372.

Where, in a partition suit, an interlocutory judgment directed a part of the real estate to be partitioned and a part to be sold, and a purchaser at the sale refused to complete his purchase, it appearing that though the report of the referee who made the sale had been confirmed, final judgment had not been entered, *held*, that the order of confirmation had, as to such purchaser, all the force and effect of a final judgment.

Kirk v. Kirk, 137 N. Y. 510.

In an equitable action the relief may be such as the facts existing at the close of the litigation demand.

Pond v. Harwood, 139 N. Y. 111.

A judgment rendered by the Supreme Court of the District of Columbia, after striking out the defendant's answer as a punishment for contempt, is void as to purchasers *pendente lite* of property involved in the action. *Hovey v. Elliott*, 145 N. Y. 126.

A recital in a judgment to the effect that an infant defendant was served with a supplemental summons is not sufficient to sustain the jurisdiction of the court, where it appears from an inspection of the roll and from other recitals in the judgment that the service was not personal, but was made upon a guardian *ad litem* whose appointment was void.

Smith v. Reid, 134 N. Y. 568.

Judgments—Continued.

The pendency of a trespass suit does not prevent a purchase of the land upon which the trespass was committed, *pendente lite*, or give to a judgment for damages subsequently recovered therein the effect of an adjudication binding the title of such intermediate purchaser. *Hailey v. Ano*, 136 N. Y. 569.

The rule in *Johnson v. Johnson*, 67 How. Pr. 144, that a party becomes bound by a judgment by formally applying to have it amended, even if sound, will not include a provision of the original judgment which has been stricken out of a previous amendment. *Potter v. Ogden*, 136 N. Y. 384.

Effect of judgment of another state upon note or chattel of this state. *Ward v. Boyce*, 152 N. Y. 191.

Recovery of judgment against a surviving partner does not prevent an action against others who united in a misappropriation of assets. *Russell v. McCall*, 141 N. Y. 437.

Where a release and satisfaction are taken by default and set aside on the ground of false representations, the court should restore the parties to their former position.

Kley v. Healy, 149 N. Y. 346.

The repeal of section 1023, Code Civil Procedure, by the act of 1894, applied to an action which had been submitted but not decided at the time it took effect.

Lazarus v. Metropolitan El. R. Co., 145 N. Y. 581.

A judgment sequestrating the property of a corporation cannot be collaterally attacked, in an action brought by the receiver, on the ground of error in the decision.

Jones v. Blun, 145 N. Y. 33.

When a statement in a surrogate's decree upon an accounting that a legatee took only a life estate is not binding on the legatee.

Washbon v. Cope, 144 N. Y. 287.

There is an implied warranty that a judgment exists on a sale of the judgment which vendor has levied upon and bought at an execution sale.

Flandrow v. Hammond, 148 N. Y. 129.

How failure of title in such case may be shown. *Id.*

The court has power to set aside a judgment for fraud and is not limited by sections 724, 1282 and 1290 of the Code.

Furman v. Furman, 153 N. Y. 209.

A party cannot complain of an order setting aside a judgment in an action for partition although it deprives him of his adjudication as to his legitimacy. *Id.*

A judgment recovered in another state is not enforceable in our courts against the receiver.

Rodgers v. Adriatic Fire Ins. Co., 148 N. Y. 34.

Force and effect of decree of a Federal court in an action removing to it from a court of this state on the ground of the citizenship of the parties considered.

Stevens v. Central National Bk., 144 N. Y. 50.

Judgments—Continued.

A judgment or decree procured by fraud may be set aside by the court as a nullity. *Id.*

Where the parties to an action in a Federal court are all residents of the state, a state court may act *in personam* and restrain them from proceeding in such action. *Id.*

III. CONFESSION.

Statement by defendant on confessing judgment, *held*, sufficient. *Critten v. Vredenburg*, 151 N. Y. 536.

Absence of knowledge of fraudulent confession of judgment by judgment creditor considered to free judgment from fraud.

Galle v. Todd, 148 N. Y. 270.

An execution on such a judgment is void as against an attachment previously obtained. *Id.*

Failure to comply with the requirement of Code Civil Procedure (§ 1274), that the defendant verify his statement, makes judgment not absolutely void but voidable at the instance of certain creditors only.

Teel v. Yost, 128 N. Y. 387.

The history of the law affecting the entry of judgment of confession in this state, reviewed. *Id.*

What is necessary to authorize the court to render a judgment by confession. *Id.*

It is not necessary that a power of attorney to confess judgment should be acknowledged or attested by a subscribing witness. *Id.*

The filing in court of a warrant of attorney authorizing the confession of a particular judgment gives the court jurisdiction. *Id.*

IV. BY DEFAULT.

Where one who had indorsed a note discounted by a bank merely to secure the application of stock held as collateral would have a defense on the note, he was bound by a judgment on default. *Walden National Bank v. Birch*, 130 N. Y. 221.

A judgment *in rem*, at least before it is finally executed, is never so conclusive upon the court which rendered it as to prevent it from opening a default.

Matter of City of Rochester, 136 N. Y. 83.

An order of the Court of Appeals, while conclusive between the parties litigating, does not prevent the opening of the judgment by the court whose judgment it has become for hearing of new party. *Id.*

When judgment by default sought to be set aside because defendants and their attorney were obliged to be in attendance on a trial in another city should stand.

Kitson v. Blake, affirmed, *it seems*, without opinion, 128 N. Y. 609.

Judgments—Continued.

Where the court has jurisdiction, judgment by default is conclusive. *Ostrander v. Hart*, 130 N. Y. 406.

A judgment in favor of one defendant against another cannot be entered upon default unless the latter had notice and opportunity to default. *Id.*

A judgment against a plaintiff in favor of a defendant determines nothing between the latter and a co-defendant. *Id.*

Where the determination of the rights of parties on the same side is required by a defendant, demand therefor must be made in the answer, and a copy thereof served upon each party to be affected by the determination. *Id.*

V. LIEN.

Judgment against one holding an equitable title subject to mortgage is not a lien upon the equitable estate.

Bates v. Ledgerwood Mfg. Co., 130 N. Y. 200.

Entry on docket "lien suspended in appeal" releases the lien of a judgment on property in which it would otherwise be a lien.

Wronkow v. Oakley, 133 N. Y. 505.

The lien of a judgment attaches to a fee estate in lands held by the judgment debtor subject to a power of sale.

Sayles v. Best, 140 N. Y. 368.

Upon a sale by executors the lien attaches to the proceeds. *Id.*

The executors are not liable for such proceeds after an accounting to surrogate and a discharge thereon. *Id.*

A judgment creditor may apply to be made a party to an accounting. *Id.*

The lien of a judgment upon real estate left by a deceased judgment debtor may continue for eleven years.

Matter of Holmes, 131 N. Y. 80.

Where the judgment debtor died intestate the lien of the judgment may continue for thirteen years. *Id.*

Fraudulent conveyance of realty during lifetime of judgment debtor is an exception to operation of above rule. *Id.*

VI. AMENDMENT, REVERSAL, SATISFACTION.

The court has no power upon motion to resettle the findings of fact and conclusions of law by amending the same and altering them to change rights of parties.

Heath v. New York Building Loan Banking Co., 146 N. Y. 260.

How satisfaction should be opened on application of party making same. *Lee v. Vacuum Oil Co.*, 126 N. Y. 579.

The court has no power to amend a judgment dismissing the complaint on the merits by appointing a referee to take an account. *Duryea v. Fuechsel*, 145 N. Y. 654.

Where the appellant was the only one of several defendants who

Judgments—*Continued.*

appeared in the action, defended and appealed, and judgment went by default against the other defendants, but by inadvertence the Court of Appeals reversed the whole judgment, its judgment should be modified so as to reverse it as to the appellant only. *Morris v. Sickly*, 137 N. Y. 604.

Judicial Sales ; *See Executors ; Execution ; Foreclosure ; Partition.*

Where the complaint in an action of foreclosure alleges that the mortgage was given by the executrix in pursuance of a power of sale in the will, and the widow, both as executrix and individually, and the infant remaindermen are made parties thereto, the judgment therein is conclusive as to those facts against all the defendants, and a purchaser at the sale thereunder will take a good title.

Roarty v. McDermott, 146 N. Y. 296.

Evidence insufficient to relieve purchaser at a foreclosure sale from his purchase on a grant that owner was not served.

O'Connor v. Felix, 147 N. Y. 614.

One who purchases real estate at a receiver's sale subject to a mortgage cannot refuse to complete because mortgage is payable in gold.

Blanck v. Sadlier, 153 N. Y. 551.

The enforcement of the specific performance of a contract to purchase real estate rests in the discretion of the court.

Haberman v. Baker, 128 N. Y. 253.

When agreed performance by the vendee at judicial sale must be decreed. *Id.*

A purchaser at foreclosure sale with notice of death of a party defendant cannot refuse to take title on such grounds.

Stephens v. Humphreys, 141 N. Y. 586.

Purchaser at a partition sale has a right to a marketable title.

Crouter v. Crouter, 133 N. Y. 55.

The right in law to redeem lands from sale exists only where given by statute. In equity, the general rule considered.

Crisfield v. Murdock, 127 N. Y. 315.

Where the purchasers at a judicial sale pay certain taxes against the property, such payment extinguishes the taxes and tax titles as against a mortgagee of the property.

Oliphant v. Burns, 146 N. Y. 218.

The referee's report, stating the payment of part of the purchase money to the purchasers for that purpose and containing a voucher for payment of the tax, is *prima facie* evidence of its payment. *Id.*

Unless under peculiar and extraordinary circumstances, objection that a party was not served with process, and that an appearance by an attorney for him was unauthorized, cannot be taken in a collateral proceeding. *Washbon v. Cope*, 144 N. Y. 287.

Jurisdiction; *See Conflict of Law; Courts; Divorce; Equity; Justice's Court.*

Wherever there is a want of authority to hear and determine the subject-matter of the controversy, an adjudication upon the merits is a nullity. *Matter of Walker*, 136 N. Y. 20.

The Court of Oyer and Terminer and the Court of Sessions had jurisdiction of an indictment under Penal Code (§ 344), for the offense of being a common gambler in selling lottery policies.

People v. Dewey, affirmed, 128 N. Y. 606.

The Supreme Court has power, as to parties over whom it has jurisdiction, to entertain an action to determine whether probate of a will in a foreign state was obtained by fraud.

Davis v. Cornue, 151 N. Y. 172.

A State Court is not deprived of jurisdiction to determine a defense of want of consideration in an action for the purchase price of a patent because such defense depends on the construction or validity of the patent.

Herzog v. Heyman, 151 N. Y. 172.

Where a patentee had issued a license, with a covenant to license but one other person to manufacture the patented article, an action may be maintained in the state courts.

Mayer v. Hardy, 127 N. Y. 125.

The legislature of New York has jurisdiction to impose a liability for dumping prohibited material in the waters of the Hudson river along the New Jersey shore, considered.

Ferguson v. Ross, 126 N. Y. 459.

Though the existence of a jurisdictional fact may not be affirmed upon the record, it will be presumed, upon a collateral attack, that the court, if of general jurisdiction, has acted correctly and with due authority.

Gridley v. College of St. Francis Xavier, 137 N. Y. 327.

The provisions of Laws 1892, chapter 342, section 2, giving to the Municipal Court of the city of Syracuse "the same jurisdiction over the persons of defendants as is now possessed by Justices' Courts of towns," is descriptive of the character rather than the territorial extent of the jurisdiction.

Curtin v. Barton, 139 N. Y. 505.

Even though the defendant does not reside in the county, the County Court has jurisdiction of an action to foreclose a mechanic's lien when the property is in the county.

Raven v. Smith, 148 N. Y. 415.

An action against stockholders of a Kansas corporation to enforce individual liability does not lie in this state.

Marshal v. Sherman, 148 N. Y. 9.

How such an action could be enforced, considered. *Id.*

Supreme Court has power to award costs upon default in an action for trespass to property in another state.

Sentenis v. Ladew, 140 N. Y. 463.

Jurisdiction—Continued.

As to whether judgment for costs can be awarded where consent cannot confer jurisdiction,—*quære*. *Id.*

Jurisdiction of the state courts may be limited by national legislation. *People v. Welch*, 141 N. Y. 266.

To exclude the jurisdiction of the state courts there must be express words of exclusion by Congress. *Id.*

The state has concurrent jurisdiction with the Federal government in manslaughter committed on the Hudson river. *Id.*

State courts cannot entertain an action for infringement of a patent. *Denise v. Swett*, 142 N. Y. 602.

But otherwise where there is an agreement to pay royalties. *Id.*

Under the constitutional provision of 1870 the Superior Court of New York city has jurisdiction of an action by a resident of another city of the state against a foreign corporation for injuries sustained without the state.

Flynn v. Central R. R. of N. J., 142 N. Y. 439.

Court of Common Pleas of New York has no jurisdiction over a personal action against a non-resident.

Paget v. Stevens, 143 N. Y. 172.

When foreign administrator has duly commenced an action upon an insurance policy found in that state by service on an agent of the company, the courts of this state should refuse to entertain jurisdiction of a subsequent action.

Sulz v. Mutual Reserve Fund Life Ass'n, 145 N. Y. 563.

When service of process on an infant defendant is not essential to the jurisdiction of a Federal court.

Sloane v. Martin, 145 N. Y. 524.

Court has no power to construe an independent business agreement in an action brought to construe a will.

Montignani v. Blade, 145 N. Y. 111.

Where the issue is as to a patent right and the parties are residents of the same state, the Federal courts have not jurisdiction.

Waterman v. Shipman, 130 N. Y. 301.

An action to determine whether a license has been given does not arise under the patent laws of the United States. *Id.*

Jurisdiction to determine question of infringement is exclusive in the Federal courts. *Id.*

Jury; *See Constitutional Law*; *Criminal Law*; *Error*; *New Trial*; *Practice*.

The summoning of trial jurors by mail is not prejudicial to defendant when all jurors qualified to sit appear.

People v. Burgess, 153 N. Y. 561.

A struck jury should not be ordered in an action for libel which

Jury—Continued.

was not an intricate case and was important only to the immediate parties to it.

Adams v. Morgan, appeal dismissed in 138 N. Y. 636.

An action to foreclose a mechanic's lien not triable by jury by release of realty from lien by a deposit or otherwise.

Schillinger Fire Proof Cement & Asphalt Co. v. Arnott, 152 N. Y. 584.

If the defendant wishes a jury trial upon an issue of fact, he should apply to the court to frame issues. *Id.*

Exceptions to rulings on examination of proposed jurors present no question for review, where no juror sat whose competency was questioned and defendant's peremptory challenges were not exhausted. *People v. Scott*, 153 N. Y. 40.

When the right to a jury trial on the question of past damages is waived. *Pegram v. New York El. R. R. Co.*, 147 N. Y. 135.

Although devisee appears in probate proceedings he is entitled to have the question of validity of a will tried by jury.

Corley v. McElmeel, 149 N. Y. 228.

It is not proper to employ extraordinary educational tests in the examination of jurors. *People v. McLaughlin*, 150 N. Y. 365.

When an exception to a ruling of court allowing a party to question thoroughly in a particular line is not available on appeal.

Carlson v. Winterson, 147 N. Y. 652.

Justice ; See Judge.

Justice of the Peace ; See Judge ; Practice ; Justice's Court.

Justice's Court.

A body execution may be issued under section 3026 of the Code by one who assigns wages and fails to pay same to assignee.

Farrelly v. Hubbard, 148 N. Y. 592.

Section 3070 of the Code as to costs, construed.

Pierano v. Merritt, 148 N. Y. 289.

Where the plaintiff, appealing to the County Court, offered judgment under Code Civil Procedure (§ 3070), as amended by Laws 1885, chapter 522, was not entitled to costs.

McKuskie v. Hendrickson, 128 N. Y. 555.

When defendant in such a case is liable for costs.

Id.

K.

Kidnapping ; See Criminal Law.

Where defendant took his married daughter, whom he had complained of to the county judge as insane and whom two physicians had so declared after examination, to a public insane

Kidnapping—Continued.

asylum in the day time, he was not chargeable with kidnapping under Penal Code (§ 211).

People v. Camp, 139 N. Y. 87.

It seems that knowledge that the person so seized and confined was not in fact insane would not establish the offense of kidnapping. *Id.*

Kin, Next of ; *See Descent ; Distribution.*

L.

Laches.

The mere *laches* of the party seeking redress from equity court, unaccompanied by circumstances amounting to an estoppel, constitutes no defense.

Galway v. Metropolitan Elevated Ry. Co., 128 N. Y. 132.

When a beneficiary cannot attack authority of executor entering into a contract setting apart real estate as part of the trust fund.

Stevens v. Melcher, 152 N. Y. 551.

Laborers, Right of ; *See Mechanic's Lien.*

Land Contract ; *See Vendor and Purchaser.*

Land Grants.

The words "by the bay" in the Nichols and Dongan patents to town of East Hampton, construed.

Trustees of East Hampton v. Vail, 151 N. Y. 463.

The provisions of such patent conveying havens and harbors, construed. *Id.*

The state cannot grant lands under water to a private person or corporation for private use. *Coxe v. State*, 144 N. Y. 396.

Such grant is not a contract between the state and its grantee which is beyond the power of revocation by a subsequent legislature. *Id.*

Unless void on its face grant of land under water by the state cannot be impeached collaterally.

Saunders v. N. Y. C. & H. R. R. Co., 144 N. Y. 75.

When commissioners of the land office have power to grant lands under water to a railroad company. *Id.*

Such grant does not extinguish the right of the upland owner to access to the river, and to construct landing. *Id.*

Landlord and Tenant; See Eviction; Fixtures; Joint Tenants; Summary Proceedings.

- I. THE RELATION AND RIGHTS THEREUNDER.
- II. THE LEASE AND COVENANTS.
- III. ASSIGNMENT AND SUBLETTING.
- IV. RENT.
- V. REPAIRS.
- VI. USE AND OCCUPATION.

I. THE RELATION AND RIGHTS THEREUNDER.

A lessee does not surrender his lease by the acceptance of a new lease executed by the agent, whom he supposes represents all of the owners of the property, when the agent has no authority to act for all the owners. *Chamberlain v. Dunlop*, 126 N. Y. 45.

Executors and testamentary trustees who are authorized to receive the rents and income of the residuary estate have power to lease the same. *Corse v. Corse*, 144 N. Y. 569.

One who is appointed a trustee for certain purposes of one of the shares into which the estate is directed to be divided is not such a trustee of the corpus of the undivided estate. *Id.*

A husband acting only as an agent of his wife is not liable for her failure to lease premises, though he has negotiated the lease.

Baer v. Bonyng, 147 N. Y. 393.

A provision in a lease giving a sub-lessee the benefit of any rights or privileges secured from the owner by the lessor entitles the sub-lessee to renewals of lease.

Robinson v. Beard, 140 N. Y. 107.

Lessee is not liable for rent where the premises are so damaged as to be untenable.

N. Y. Real Estate & Building Improvement Co. v. Mottey, 143 N. Y. 156.

A renting of apartments in a city house for business purposes is not within the Statute of Frauds though a stipulation for board and lodging be included. *Crane v. Powell*, 139 N. Y. 379.

Liability of landlord when premises are in a dangerous condition and a nuisance to the public and adjoining owners.

Timlin v. Standard Oil Co., 126 N. Y. 514.

The landlord is charged with duty of reasonable care to inform himself of the condition of the property, and is liable to respond in damages to any one injured in consequence of and by the nuisance. *Id.*

A lessee who sub-leases the premises containing the nuisance is liable to same degree as landlord. *Id.*

The liability of a lessee discussed. *Id.*

Landlord liable for failure to maintain premises in suitable repair. *Dollard v. Roberts*, 130 N. Y. 269.

Failure to repair after notice to agent is negligence. *Id.*

Landlord and Tenant—Continued.

The question of negligence is for the jury. *Id.*

Landlord is not liable to accident to guest of tenant caused by no light being in the hall. *Hilsenbeck v. Guhring*, 131 N.Y. 674.

Such guest was entitled to same care from landlord as a tenant. *Id.*

An agreement being void under the Statute of Frauds, no rights exist under it, and no relation of landlord and tenant arises out of it nor in consequence of any occupancy under it. *English v. Marvin*, 128 N. Y. 380.

It seems that a tenancy from year to year cannot grow out of a void parol lease. *Id.*

A farm lease does not vest title to the hay grown thereon in the lessor as security for the rent. *Briggs v. Austin*, 129 N. Y. 208.

The right of a tenant to remove fixtures must be exercised before the expiration of the term or before he quits possession; his rights under renewal of the lease, construed. *Talbot v. Cruger*, 151 N. Y. 117.

Tenant has right to erect structures to carry on his business. *Andrews v. Day Button Co.*, 132 N. Y. 348.

A covenant not to alter without consent refers to a material and substantial alteration only. *Id.*

Landlord has no claim upon an improvement made at lessee's expense without injury. *Id.*

A judgment in favor of a landlord in summary proceedings for non-payment of rent is a bar to an action by the tenant to cancel the lease. *Reich v. Cochran*, 151 N. Y. 122.

The right of a landlord to use a sewer running under the demised premises does not permit him to so use it as to injuriously affect the tenant's possession. *Sully v. Schmitt*, 147 N. Y. 248.

An assignment for creditors which provides for the payment of the assignor's debts and liabilities then "due or to grow due" does not cover a contingent liability for a possible deficiency in rent of leased premises. *Matter of Hevenor*, 144 N. Y. 271.

Obligations in a void lease will not be enforced by the courts. *Ernst v. Crosby*, 140 N. Y. 364.

The knowledge that the premises leased will or may be used for unlawful purposes will render a lease void. *Id.*

Such knowledge and intent may be shown by circumstantial evidence. *Id.*

If a purchaser does not avail himself of the opportunity to learn the character of the lease, he cannot recover rent. *Id.*

Where the lessor has no authority to enter the leased premises, he cannot give others permission to enter without consent of lessee. *McKenzie v. Hatton*, 141 N. Y. 6.

Lessor is liable to his lessee for removal of adjoining wall which supported the leased premises. *Snow v. Pulitzer*, 142 N. Y. 263.

Landlord and Tenant—Continued.**II. THE LEASE AND COVENANTS.**

The executor of a lessor is bound by the latter's covenant to rebuild and is liable for breach of covenant.

Chamberlain v. Dunlop, 126 N. Y. 45.

A provision in a lease giving the lessor an option to require the tenant, at the expiration of the term, to build a wall between the two lots upon which the leased building was erected, or in the alternative that the fixtures, machinery, etc., upon the leased premises "at the expiration of this lease" shall become the property of the lessor, construed.

Loeser v. Liebman, 137 N. Y. 163.

It seems that the tenant would have the right, during the term, to make changes and substitutions. *Id.*

A covenant on the part of the lessee to "keep and maintain, at his own cost and expense, a proper and substantial brickyard upon the whole of the demised premises," requires him to furnish everything necessary to such yard not on the premises.

Scott v. Haverstraw Clay & Brick Co., 135 N. Y. 141.

A covenant to "preserve the property from deterioration" requires him to offset the natural wear. *Id.*

A further provision that he will not permit or allow bricks to be thrown into the river near the bulkheads, requires him at the end of the term to remove any thrown in. *Id.*

A provision that the lessee shall keep in a brickyard a certain amount of brick as security for rent, creates a lien upon said brick to the extent of the rent due upon a sale thereof.

Bleakley v. Sullivan, 140 N. Y. 175.

Where the rent due is paid, the lessor has no lien upon the brick covered by a chattel mortgage. *Id.*

Expiration of the time limited in order to give the creditor the additional one year,—*quære*. *Id.*

When the taking and retaining possession of the premises by the lessee is not a waiver of his right to claim damages for a breach of the covenant of landlord to repair.

Thomson-Houston Electric Co. v. Durant Land Imp. Co., 144 N. Y. 34.

Measure of damages for breach to repair under lease reserving to the landlord a right of re-entry to make repairs, and provides that in such case the rent shall be suspended "in similar manner and proportions" as in case of fire, considered. *Id.*

Covenants by a lessee to keep the premises in good repair do not extend to a nuisance from a stench from sewage from landlord's property adjoining. *Sully v. Schmitt*, 147 N. Y. 248.

When tenants under a lease providing for, were entitled to the renewals and the trustee under the beneficiary's will could be compelled to execute a new lease.

Gomez v. Gomez, 147 N. Y. 195.

Landlord and Tenant—Continued.

Where there is no covenant that the premises are in good repair, one will not be implied that they are without inherent defects.

Daly v. Wise, 132 N. Y. 306.

No recovery can be had upon abandonment of a lease founded on false representations.

Id.

Otherwise where the statements are not made in bad faith, though wrong.

Id.

III. ASSIGNMENT AND SUBLETTING.

Tenant at will cannot assign any of his rights.

London v. Townshend, 129 N. Y. 166.

Recognition of such assignment by landlord will make assignee tenant at will.

Id.

IV. RENT.

The re-letting of premises upon breach of lease does not release the lessee.

Underhill v. Collins, 132 N. Y. 269.

Acceptance of surrender of leased premises prevents recovery of rent not due.

Id.

If premises leased to a corporation are vacant before the expiration of the term on the appointment of a receiver in a statutory proceeding for the dissolution of the corporation for insolvency, and the lessor, in accordance with the terms of the leases, re-enters and re-lets to a third party for the unexpired term at a less rental, the difference between the rent for the balance of the term reserved under the original lease and that reserved under the subletting constitutes a definitely established claim against the corporation.

People v. St. Nicholas Bank, 151 N. Y. 592.

The situation of the receiver of an insolvent corporation is less restricted than that of an assignee under a general assignment for the benefit of creditors.

Id.

V. REPAIRS.

Covenant not to alter without consent refers to material and substantial alteration.

Andrews v. Day Button Co., 132 N. Y. 348.

Expense of repairing may be set up as counter-claim on breach of covenant.

McCulloch v. Dobson, 133 N. Y. 114.

A tenant is not bound to make permanent and important repairs which the landlord has covenanted to make.

Thomson-Houston Electric Co. v. Durant Land Imp. Co., 144 N. Y. 34.

VI. USE AND OCCUPATION.

When an abandonment of the premises on the ground of eviction is justified.

Sully v. Schmitt, 147 N. Y. 248.

In an action by an assignee of a lease to redeem from a forfeiture

Landlord and Tenant—Continued.

thereof after a re-entry by the landlord, a temporary injunction restraining the landlord from removing from the premises personal property placed thereon by the tenant should not be granted. *Koehler & Co. v. Brady*, 144 N. Y. 135.

Possession for one year "from the date hereof" expires at midnight of the preceding day of the next year.

Buchanan v. Whitman, 151 N. Y. 253.

A lease made to several partners is not renewed by the holding over of one of them. *Id.*

A surrender of a lease to allow partition of property, *held*, to operate to continue preceding title against railroad.

Witmark v. New York El. R. R. Co., 149 N. Y. 393.

Tenant holding over after the expiration of a term, becomes tenant from year to year, and may quit the premises at the end of any year without giving notice.

Adams v. City of Cohoes, 127 N. Y. 175.

Where the grantor left his property upon the premises, and when rent was demanded remonstrated as to the amount, *held*, relation of landlord and tenant must be established to warrant an action for use and occupation. *Preston v. Hawley*, 139 N. Y. 296.

An action for use and occupation cannot be maintained without proof of an agreement to pay rent.

Lamb v. Lamb, 146 N. Y. 317.

If such notice were necessary, tendering possession, hiring other premises and refusing to pay subsequent rent would be sufficient. *Id.*

Where a tenant from year to year holds over his term, a renewal of lease is implied. *Haynes v. Aldrich*, 133 N. Y. 287.

The option to regard it as a renewal is with the landlord. *Id.*

Where the holding over is actual, prior notice of intention not to remain is immaterial. *Id.*

Plea that holding over was involuntary is insufficient. *Id.*

An attempt to rent is not an acceptance of surrender of premises. *Id.*

Larceny ; See Criminal Law.

The rule that a false statement of the amount or quantity of goods or commodities used in repairing a building that when in place they would be hidden from view, raises question for jury as to whether larceny by false pretenses is established.

People v. Rice, affirmed on opinion below in 128 N. Y. 649.

Under Penal Code (§ 528), a false token or writing is not necessary to make a case of false pretenses, provided the property was obtained by false representations. *Id.*

Separate counts for burglary, larceny and receiving stolen goods may be joined in the same indictment.

People v. Wilson, 151 N. Y. 403.

Larceny—Continued.

To constitute larceny under Penal Code (§ 528), it is not necessary that the property should have been obtained by a trespass.

People v. Laurence, 137 N. Y. 517.

An indictment for so obtaining possession of two horse cars, *held*, sufficient. *Id.*

One who has the actual custody of property, though not the legal, may be liable for misappropriation.

People v. Sherman, 133 N. Y. 349.

No defense that the proceeds of wrongful sale went into his bank account as manager and were applied upon the corporation's liabilities. *Id.*

Legacies; See *Executor and Administrator; Surrogate's Court; Trusts; Wills.*

I. NATURE AND EFFECT.

II. PAYMENT.

III. CHARGE ON REAL ESTATE.

I. NATURE AND EFFECT.

The executor of one entitled to a legacy has a right to receive it for the purposes of administration.

Matter of Murphy, 144 N. Y. 557.

When Statute of Limitations begins to run in favor of the person to whom a legacy is left after the death of another.

Gilbert v. Taylor, 148 N. Y. 298.

A contingency which will render a legacy inalienable must be one which relates to the person who will take.

Sawyer v. Cubby, 146 N. Y. 192.

When residuary legatees to whom balance of the estate was distributed are not liable for loss of trust fund through misconduct of the executors, when parties interested in the trust estate were not cited upon the accounting. *Mills v. Smith*, 141 N. Y. 256.

With respect to payment made by executor to legatees regarded as advances, they take without other risk than such as may arise by reason of an insufficiency of assets. *Id.*

II. PAYMENT.

Where a portion only of a trust fund is set apart, the executors agreeing that, until the residue is set up, the *cestui que trust* shall receive "the interest to which she is in law entitled on the unpaid part of her trust legacy," she is entitled to the interest which the law allows at the times it accrues.

Stevens v. Melcher, 152 N. Y. 551.

An assessment for a local improvement, for which the decedent was not personally liable under the terms of the charter is not

Legacies—Continued.

a debt or tax which the executor is required to pay under section 2719 of the Code. *Matter of Hun*, 144 N. Y. 472.

The surrogate has no power to compel a legatee to restore the amount of an overpayment, but an action lies in favor of executor to recover it. *Matter of Lang*, 144 N. Y. 275.

In an action against heirs or devisees under sections 1844 *et seq.* of the Code, a *bona fide* mortgagee is entitled to payment from the proceeds of the sale in preference to creditors of the decedent. *Cunningham v. Parker*, 146 N. Y. 29.

III. CHARGE ON REAL ESTATE.

A residuary legatee receiving estate charged with a legacy is directly responsible to legatee. *Gilbert v. Taylor*, 148 N. Y. 298.

Failure to secure letters testamentary for three years does not suspend creditor's right of action against an heir or devisee.

Adams v. Fassett, 149 N. Y. 61.

What time must elapse before an action against an heir can be maintained under section 1844 of the Code. *Id.*

Legal Representatives ; See Agency ; Attorney.**Legislature ; See Constitutional Law.**

The legislature cannot take private property for other than a public use without the consent of the owner, either with or without compensation.

Waterloo Woolen Mfg. Co. v. Shanahan, 128 N. Y. 345.

What use is a judicial question, and legislature cannot declare the use to be public or private. *Id.*

Legitimacy.

Legitimacy will be presumed, and the burden of proof rests upon those alleging illegitimacy ; ruling applied.

Matter of Matthews, 153 N. Y. 443.

Letter of Credit ; See Contract ; Guaranty.**Levy ; See Attachment ; Execution.****Libel and Slander.****I. WHAT CONSTITUTES.****II. PRIVILEGED COMMUNICATIONS.****III. PLEADING AND EVIDENCE.**

Libel and Slander—Continued.**I. WHAT CONSTITUTES.**

It is libelous *per se* to charge an attorney with incapacity to defend a particular class of actions.

Mattice v. Wilcox, 147 N. Y. 624.

A newspaper article stating that plaintiff "has left the city with \$8,500 of the Southern Bank's money;" that he left said city "on Sunday night and, it is supposed, went to New York," is libelous *per se*.

Turton v. New York Recorder Co., 144 N. Y. 144.

When a printer who prints libelous matter of another is liable as a publisher.

Youmans v. Smith, 153 N. Y. 214.

When a list of questions in relation to the reputation of an attorney against whom proceedings for disbarment are pending, which are to be submitted to witness is privileged.

Id.

No recovery can be had for utterance of repetition of slanderous words.

Enos v. Enos, 135 N. Y. 609.

II. PRIVILEGED COMMUNICATIONS.

A publication is not privileged which was in a circular in regard to village matters published before election.

Mattice v. Wilcox, 147 N. Y. 624.

Where the facts upon which a claim of privilege are disputed, the question is for the jury.

Warner v. Press Publishing Co., 132 N. Y. 181.

Proof of falsity of a publication is evidence of malice.

Id.

Where the evidence tends to establish absence of malice, the question is for the jury.

Id.

When recklessly and carelessly published will support an award of punitive damages.

Id.

A privileged communication is one made under such circumstances as rebut the legal inference of malice.

Hemmens v. Nelson, 138 N. Y. 517.

III. PLEADING AND EVIDENCE.

What is necessary to constitute mitigating circumstances.

Hemmens v. Nelson, 138 N. Y. 517.

To show that the charge was false is not evidence of malice.

Id.

Circumstances under which a direction of a verdict for defendant in an action for slander was proper in the absence of proof of actual malice.

Id.

When defendant cannot complain of an instruction of court that the words have a milder meaning.

Mattice v. Wilcox, 147 N. Y. 624.

An allegation in the complaint that by reason of the publication plaintiff has been "held up to the public, his business acquaint-

Libel and Slander—Continued.

ances and friends as a thief and a dishonest and untrustworthy man," is a sufficient innuendo.

Turton v. New York Recorder Co., 144 N. Y. 144.

Causes of action for slander and false imprisonment cannot be joined in same complaint.

De Wolfe v. Abraham, 151 N. Y. 186.

When court is justified in charging that the publication of libel was made "wantonly, recklessly and with utter disregard."

Id.

A mere offer to publish a retraction is not available in mitigation of damages.

Id.

Where but one of two charges of libel is presented to the jury, the defendant may give evidence in justification of the other in mitigation of damages.

Holmes v. Jones, 147 N. Y. 59.

In an action for libel the jury may award punitive damages when malice is proven.

Id.

When in a libel suit a charge that punitive damages cannot be awarded is harmless and is not a ground for reversal.

Smith v. Matthews, 152 N. Y. 152.

A libel recklessly or carelessly published as well as one induced by personal ill-will will support an award of punitive damages.

Id.

Where the complaint alleges several slanderous charges justification of one is sufficient.

Lanpher v. Clark, 149 N. Y. 472.

What is sufficient to show justification.

Id.

License; See Excise.

Parol license is revocable at the pleasure of licensor.

Crosdale v. Lanigan, 129 N. Y. 604.

Lien; See Attachment; Attorney; Carriers; Execution; Factor; Judgments; Mechanic's Lien; Mortgages; Vendor and Purchaser.

Is commensurate only with the liability created when money was advanced.

Drexel v. Pease, 133 N. Y. 129.

The lien of a collector's bond is subordinate to that of a prior unrecorded mortgage upon the lands of a surety.

Crisfield v. Murdock, 127 N. Y. 315.

Under Laws 1862, chapter 482, as amended by Laws 1863, chapter 422, unfinished ferry boats are subject to a lien for materials furnished in their construction.

Phoenix Iron Co. v. Vessels "Hopatcong" and "Musconetcong", 127 N. Y. 206.

When two boats are built from same shipment of material for same party, at the same time and place, the lien under the statute may be enforced against both in the same proceedings.

Id.

Lien—Continued.

Where a foreign corporation delivered to shipbuilders at their place of business in this state the materials, the debt was contracted within the state within the meaning of the act. *Id.*

Acceptance of notes by parties furnishing materials when builders were insolvent, and with fraudulent design by the extension of time of payment to discharge the lien, will not deprive the sellers of their lien. *Id.*

Limitation of Actions ; *See Statute of Limitations.*

Limitation of Estates ; *See Devise ; Remainders ; Trusts.*

Limited Partnership ; *See Partnership.*

Liquidated Damages ; *See Damages.*

Liquor Tax Law ; *See Civil Damage Act ; Excise.*

The Liquor Tax Law of 1896 is not a tax law.

People ex rel. Einsfeld v. Murray, 149 N. Y. 367.

Section 13 of the Liquor Tax Law as to the distribution of funds does not appropriate public money contrary to the meaning of article 3, section 20 of the Constitution, and was properly based. *Id.*

The Liquor Tax Law is not invalidated because it did not follow the classification of cities in article 12 of the Constitution. *Id.*

The Liquor Tax Law is not a special city act. *Id.*

Lis Pendens ; *See Notice of Pendency of Action.*

Literary Property.

The originator of an idea or system must himself protect it from escape or disclosure.

Bristol v. Equitable Life Assurance Society, 132 N. Y. 264.

Littoral Proprietor ; *See Riparian Owner.*

Lotteries.

The racing of horses for a purse given by an association does not constitute a lottery within chapter 8 of the Penal Code.

People ex rel. Lawrence v. Fallon, 152 N. Y. 12.

Lunacy ; *See Insanity ; Insane Persons.*

What is not a judgment within the meaning of section 376 of the Code. *Sheldon v. Mirick*, 144 N. Y. 498.

M.

Maintenance ; *See Champerty.*

Malicious Mischief.

Unlawful and willful destruction of property must exist and be proved. *People v. Kane*, 131 N. Y. 111.

A guilty and wicked intention cannot be implied as a necessary ingredient. *Id.*

The destruction of a boat unlawfully upon the premises of another is not actionable. *People v. Kane*, 142 N. Y. 366.

In the provision of Penal Code (§ 639), that any person who willfully or maliciously displaces a pipe or main for conducting water or gas is punishable, the word "willfully" includes the idea of an act intentionally done with a wrongful purpose.

Wass v. Stephens, 128 N. Y. 123.

Malicious Prosecution ; *See Damages ; False Imprisonment.*

It is sufficient that the criminal prosecution has terminated in favor of plaintiff. *Robbins v. Robbins*, 133 N. Y. 597.

What constitutes malicious prosecution discussed in case where defendant, an owner of water-works, caused arrest of employe of park commissioners who ordered him to disconnect water-mains. *Wass v. Stephens*, 128 N. Y. 123.

Where a party has been unnecessarily caused additional grievance in a civil action he may maintain an action for damages therefor.

Willard v. Holmes, Booth and Haydens, 142 N. Y. 492.

Such an action may, in a proper case, be maintained against a corporation. *Id.*

It must be shown that from the facts no person would believe that a good cause of action existed against him. *Id.*

The question of probable cause, where the facts are conceded, is one of law. *Id.*

Where the action was brought upon probable cause by the officers of a corporation, the corporation is not liable. *Id.*

Clear and satisfactory proof must be given to recover for malicious prosecution of a civil action.

Ferguson v. Arnow, 142 N. Y. 580.

The plaintiff is bound to show want of probable cause for the prosecution of former action. *Id.*

Obtaining an order of arrest in the first action has no bearing on question of probable cause. *Id.*

Mandamus.

I. FOR WHAT IT ISSUES.

II. PRACTICE.

Mandamus—Continued.**I. FOR WHAT IT ISSUES.**

Court has no power to direct trustee to fix salary where a village charter leaves it to the discretion of the board of trustees.

People ex rel. Goring v. President, etc., of Village of Wappingers Falls, affirmed, 144 N. Y. 616.

Mandamus will lie to compel the recognition as an officer of a person who received a majority of the votes cast for an office required to be filled. *Id.*

Citizen and voter may apply for writ to compel performance of official duty.

People ex rel. Daley v. Rice, 129 N. Y. 449.

The arbitrary refusal of a medical college to confer a degree in accordance with its engagements through its circulars may be compelled by *mandamus*.

People ex rel. Cecil v. Bellevue Hospital Medical College, affirmed on opinion, 128 N. Y. 621.

The judgment in *quo warranto* proceedings to try the title of the respondent to an office cannot provide for the inducting of the relator into such office; *mandamus* is the proper remedy.

People ex rel. Sears v. Toby, 153 N. Y. 381.

The rule that a *mandamus* is not the proper remedy by which to try the title to an office,—reiterated.

People ex rel. Willson v. Trustees of Mount Vernon, affirmed, *it seems*, without opinion in 128 N. Y. 657.

To compel the performance of a ministerial duty by a public officer *mandamus* is proper.

People ex rel. Wooster v. Maher, 141 N. Y. 330.

Where a person or board is clothed with discretion, the writ can only compel the rendering of a decision. *Id.*

Where the mayor of a city is confided with the power to determine whether or not summary proceedings shall be instituted in a given case, he cannot be compelled to act by *mandamus*. *Id.*

The duty of a mayor is not made mandatory by a resolution of the Common Council. *Id.*

The payment of money to be recovered by action cannot be compelled by *mandamus*.

People ex rel. Huntington v. Crennan, 141 N. Y. 239.

Will not issue to compel issuing of certificate of election to one ineligible.

People ex rel. Sherwood v. State Board of Canvassers, 129 N. Y. 360.

When a contractor is entitled to a *mandamus* requiring the completion of the collection or the issue of bonds for work in city improvement.

People ex rel. Ready v. Mayor of Syracuse, 144 N. Y.

Mandamus—Continued.

Duties of commissioners of land office are of a judicial character and cannot be enforced by *mandamus*.

People ex rel. Harris v. Commissioners of the Land Office, 149 N. Y. 26.

When *mandamus* will not lie to compel reinstatement in office.

People ex rel. Corrigan v. Mayor, 149 N. Y. 215.

When the acts of the comptroller of Brooklyn are ministerial and can be controlled by *mandamus*.

Matter of Freel, 148 N. Y. 165.

Mandamus may issue to compel the certification of incorporation of an insurance company by the attorney-general.

People ex rel. Woodward v. Rosendale, 142 N. Y. 126.

To same effect.

People ex rel. Fargo v. Rosendale, 142 N. Y. 670.

The board of supervisors of two counties may be compelled by *mandamus* to keep bridge, on highway crossing waters separating the counties, in repair.

People ex rel. Keene v. Sup. 142 N. Y. 271.

Mandamus will not lie to compel the register of deeds to discharge mortgages not yet paid, and of which the petitioner has no satisfaction pieces.

People ex rel. Sayles v. Fitzgerald, affirmed without opinion, 128 N. Y. 620.

Is not proper remedy where question of title to office turns upon construction of statutes.

People ex rel. Wren v. Goetting, 133 N. Y. 569.

The proper proceeding is by *quo warranto*.

Id.

Writ restraining the state board of canvassers must be granted at General Term.

People ex rel. Derby v. Rice, 129 N. Y. 461.

The comptroller of the city of New York in drawing his warrant on the city chamberlain for the amount of state taxes acts ministerially, and a *mandamus* is proper to require him to do it.

People v. Myers, affirmed without opinion, 126 N. Y. 639.

When *mandamus* will not lie to determine the validity of a claim to an office.

People ex rel. Lewis v. Brush, 146 N. Y. 60.

II. PRACTICE.

Where on a motion for a *mandamus* opposing affidavits are read which are in conflict with moving affidavits, and, notwithstanding this, demands a peremptory writ which is equivalent to a demurrer, as to undisputed question of fact the answering affidavits are conclusive and must be regarded as true.

Matter of Hæbler v. New York Produce Exchange, 149 N. Y. 414.

What allegations of fact in relator's affidavit, undisputed, are to be taken as true.

People ex rel. Corrigan v. Mayor, 149 N. Y. 215.

Mandamus—*Continued.*

Where the affidavits are in conflict, the question as to the right to the writ must be determined on the assumption that the averments of the opposing affidavits are true.

People ex rel. Lewis v. Brush, 146 N. Y. 60.

What objection will not be considered in proceedings for *mandamus* to compel a comptroller of New York city to pay an award made by commissioners.

People ex rel. Purdy v. Fitch, 147 N. Y. 355.

One who does an act with knowledge that the court has decided to restrain the doing thereof is guilty of contempt.

People ex rel. Platt v. Rice, 144 N. Y. 249.

If the relator so elects at the time of the entry of order he may have his damages awarded in a proceeding where a peremptory writ is granted.

People ex rel. Goring v. Prest. of Wappingers Falls, 151 N. Y. 386.

Stipulating for the appointment of a referee to determine relator's damages is a waiver of the right to object to his failure to prove damages in the first instance. *Id.*

A writ of *mandamus* being discretionary will not be granted to permit manifest injustice in favor of a relator.

People ex rel. Wood v. Assessors and Collector of Taxes, etc., of Brooklyn, 137 N. Y. 201.

Pleading must contain facts and not conclusion of law.

Pierce, Butler & Pierce Mfg. Co. v. Bleckwenn, 131 N. Y. 570.

Where a peremptory writ of *mandamus* is too broad, including matters not warranted by the proofs, it is discretionary with the trial court whether it shall amend the writ or quash it.

People ex rel. Hasbrouck v. Supervisors of Dutchess, 135 N. Y. 522.

Manslaughter; *See Criminal Law.*

Manufacturing Corporations; *See Corporations*; *Foreign Corporations*; *Gas Companies.*

Circumstances under which *held* that a preliminary restraining order in an action by a stockholder to procure the appointment of a receiver was no excuse for the failure of a creditor to obtain a judgment against the corporation under section 24 of the act of 1848.

United Glass Co. v. Vary, 152 N. Y. 121.

The complaint in an action to enforce a stockholder's liability for the debts of the corporation under the Manufacturing Act of 1848, on the ground that no certificate of payment for the capital stock was ever made or filed, need not suggest the exemption from such liability created by the amendment of 1853.

Rowell v. Janvrin, 151 N. Y. 60.

Manufacturing Corporations—Continued.

A complaint in such action is not demurrable because of an omission to state the amount or value of the stock held by defendant. *Id.*

An exemption of liability under section 10 of the General Manufacturing Act, chapter 333, of Laws of 1853, considered.

Close v. Noye, 147 N. Y. 597.

Such exemption is not affected by subsequent repeal of the law by the Stock Corporation Law in so much as the latter law had a saving clause in it. *Id.*

Maritime Contracts ; *See Ships and Vessels.*

Marriages ; *See Curtesy ; Divorce ; Dower ; Husband and Wife.*

Marriage Settlements ; *See Husband and Wife.*

Married Woman.

A will of a married woman who subsequently becomes a widow is not revoked by her marriage.

Matter of McLarney, 153 N. Y. 416.

The Married Woman's Act of 1849 did not extend the rule as to wills of married women to such a case. *Id.*

Although a wife only has an inchoate right of dower, yet she may execute a deed which is recorded, on the ground of forgery.

Clifford v. Kampfe, 147 N. Y. 383.

When such action may be maintained, considered. *Id.*

Chapter 248 of 1879, allowing wives to sign policies with consent of husband, applies to policies of foreign companies within the state.

Spencer v. Myers, 150 N. Y. 269.

Marshaling Securities ; *See Debtor and Creditor ; Payment.*

Master and Servant ; *See Agency ; Negligence ; Parent and Child ; Railroad ; Seduction ; Work, Labor and Services.*

I. THE RELATION AND RIGHTS OF MASTER.

II. LIABILITY OF MASTER TO SERVANT.

III. LIABILITY FOR ACTS OF SERVANT.

IV. COMPENSATION.

I. THE RELATION AND RIGHTS OF MASTER.

The words "in good faith" in a contract of employment, construed.

Smith v. Robson, 148 N. Y. 252.

Policemen appointed by the trustees of the New York and Brooklyn Bridge are public officers and the two cities are not responsible for their actions.

Woodhull v. Mayor, 150 N. Y. 450.

Master and Servant—Continued.

When refusal by an employe to deliver to his employer a paper or memorandum is a sufficient ground for discharge.

Gray v. Shepard, 147 N. Y. 177.

Retention of the servant in the employment after knowledge of breaches of the contract does not condone them, nor prevent their subsequent use as grounds of discharge. *Id.*

When the fact that contract was for one year was established by pleadings. *Solomon v. Vallette*, 152 N. Y. 147.

A written contract of employment may be modified by a subsequent oral agreement so as to allow that to be done which the original contract prohibited. *Id.*

In an action for a wrongful discharge, brought before the expiration of the term of employment, wages accruing after the commencement of the action may be recovered. *Id.*

The mere fact of a contemplated marriage, or the marriage itself, of a female servant does not necessarily, as matter of law, disqualify her from performing services as contemplated by an agreement of employment as housekeeper.

Edgecomb v. Buckhout, 146 N. Y. 332.

Testimony of a witness ignorant of railroading after seeing rotten ties, considered insufficient to authorize an inference that the road bed was the proximate cause of the wrecking of the train.

Wooden v. Western New York & Pennsylvania R. R. Co., 147 N. Y. 508.

When conductor exercises his judgment in carrying out rules of a railroad company he is a fellow-servant of the brakeman and not a representative of the company. *Id.*

What conditions are not sufficient to create relation of master and servant.

Butler v. Townsend, 126 N. Y. 105.

One who contracted with the owner of a vessel for a gang of men to make certain repairs to its hull for a compensation, dependent upon the amount of materials used, makes him an independent contractor for whose negligence owners are not liable. *Id.*

Different classes of employes working at the same time under a common master are fellow-servants. *Id.*

The originator of an idea or system must protect it himself from loss or disclosure; relation of master and servant does not change rule.

Bristol v. Equitable Life Assurance Soc., 132 N. Y. 264.

Evidence held insufficient to prove that a party is general manager of a corporation.

Coler v. Pittsburgh Bridge Co., 146 N. Y. 281.

It seems that it is immaterial that the special and peculiar work of one class of employes is done before that of the other commences. *Id.*

Master and Servant—*Continued.***II. LIABILITY OF MASTER TO SERVANT.**

When a railroad company permitting cars to be switched and kicked upon tracks running into repair shop is liable for failure to furnish a safe place for workmen employed in the shop.

Doing v. N. Y., O. & W. R. R. Co., 151 N. Y. 579.

The duty of a railroad company is to change the manner of operation where it is known that its employes are doing work in a reckless manner. *Id.*

Brakeman assumes the risk which the conductor takes in carelessly taking a train to a certain point which posted rules of the company leave to his discretion.

Wooden v. Western New York & Pennsylvania R. R. Co., 147 N. Y. 508.

Although freight train is only equipped with hand-brakes, such evidence alone does not charge the company with negligence. *Id.*

An action cannot be maintained for injury to an employe sustained through the sudden and unexplained starting of a machine, which plaintiff claims was due to an alleged defect not pointed out by the proof.

Dingly v. Star Knitting Co., 134 N. Y. 552.

If the injury may be inferred to have arisen from either of two causes equally probable, one of which is attributable to the employe, a nonsuit is proper. *Id.*

Failure to provide a proper fire-escape may be predicated upon a finding of the master's negligence in removing steps from beneath it.

Johnson v. Steam Gauge and Lantern Co., 146 N. Y. 152.

Master furnishing suitable materials to construct a scaffold is not liable to workmen who improperly construct it.

Kimmer v. Weber, 151 N. Y. 417.

An employer failing to provide reasonably safe place to work upon is chargeable with negligence.

Davidson v. Cornell, 132 N. Y. 228.

The defective condition must be such as is apparent to the observation. *Id.*

Though the defect be apparent, one using it does not assume the hazard thereof at all events, and the question of contributory negligence is one of fact. *Id.*

The perils not obvious which are assumed by the employe are such as exist after the master has used due care and precaution to guard the former from danger. *Id.*

Master is not liable where the foreman directs an employe to do work outside of his regular duties.

Crown v. Orr, 140 N. Y. 450.

One who continues in employment with knowledge of danger is deemed to have accepted the risks. *Id.*

Master and Servant—Continued.

The personal negligence of the master must be established to warrant a verdict against him. *Id.*

The presumption is that a master has performed his duty. *Id.*

Where an employe gives no indication that he is not acquainted with its use, it is not negligence to ask him to operate a new machine. *Id.*

The master is not obliged to warn a servant of dangers which are apparent. *Id.*

An employe is not guilty of contributory negligence in following the directions of his employer.

Stuber v. McEntee, 142 N. Y. 200.

When a railroad company is not chargeable with negligence in failing to detect an habitual violation of duty in a servant who was competent when employed.

Cameron v. N. Y. C. & H. R. R. Co., 145 N. Y. 400.

A master has a right to use an incomplete structure and to ask his servants to continue work thereon before it is completely planked over. *Kennedy v. Manhattan R. Co.*, 145 N. Y. 288.

It is error to submit to jury question where it clearly appears that the servant had knowledge of the condition of the place where he was at work. *Id.*

Question whether defendant had actual notice of defects in an abutment, not visible or capable of detection from the outside, one for the jury to determine. *Id.*

Although Factory Act requires *cog wheels* to be covered, yet servant may properly be held to assume the risks thereof.

Knisley v. Pratt, 148 N. Y. 372.

Where an employer provides a machinist to make repairs he is not bound to instruct day laborers how to make such repairs.

McCue v. National Starch Mfg. Co., 142 N. Y. 106.

Where a servant performs an act of obvious danger, and outside his duties, the master is not liable. *Id.*

The real platform of a one-horse car which is narrower than the car and protected by a dashboard 30 inches high is not necessarily an unsafe place to put a boy 11 years old to drive an horse. *Marks v. Rochester R. Co.*, 146 N. Y. 181.

A master is not liable for an injury sustained by a servant by a accident, which the master as a prudent man could not have anticipated.

Del Sejnore v. Hallinan, 153 N. Y. 274.

It is for the jury to determine from the facts whether a dam which gave way was reasonably secure and whether the plaintiff assumed the risks of the situation.

Palmer v. Conant, affirmed, *it seems*, without opinion, 128 N. Y. 577.

The act of a foreman in a quarry is fellow-servant of laborer, and master not liable for injuries to laborer from unexpected blasting.

Cullen v. Norton, 126 N. Y. 1.

Master and Servant—Continued.

The employer is bound to communicate information known to him to apprise the workman of the possible risks.

Gates v. State of N. Y., 128 N. Y. 221.

The staging erected along the hull of a vessel for the purpose of repairs is to be deemed an appliance within the rule that master must furnish safe appliances.

Butler v. Townsend, 126 N. Y. 105.

The duty of proper inspection of its rolling stock is incumbent on a railroad company and is not discharged by the adoption of a rule therefor without its enforcement.

Bailey v. Rome, Watertown, etc., R. R. Co., 139 N. Y. 302.

In an action by a brakeman for injuries caused by the giving way of a defective brake, the question of defendant's negligence and plaintiff's contributory negligence were properly left to the jury, the evidence being sufficient to warrant a finding that the bolt was in the same condition as when the car started.

Fahy v. Rome, Watertown & Ogdensburg R. R. Co., affirmed without opinion in 128 N. Y. 677.

Where plaintiff entered upon the employment of wheeling a barrow on an inclined platform two feet wide and fell off and was injured, he assumed the risk.

Kaare v. Troy Steel & Iron Co., 139 N. Y. 369.

Where in such case defendant has furnished torches to light the platform, but the workmen did not use them, the defendant discharged its duty, and was not chargeable with negligence.

Id.

Where a lad of sixteen years, who had had experience with the same machinery in other factories, was injured, the omission of defendants to give him oral instruction of the dangerous character of the saw did not make them liable to him in damages.

Ogley v. Miles, 139 N. Y. 458.

A railroad company is not negligent in failing to enact a rule forbidding employes moving other cars upon the one being repaired which by regulation is marked with red flag.

Corcoran v. Delaware, Lackawanna, etc., R. R. Co., 126 N. Y. 673.

Where an agent in using his judgment acts for the benefit of the company, the company is liable for his error.

Palmeri v. Manhattan Ry. Co., 133 N. Y. 261.

Failure to obey orders is contributory negligence.

Moeller v. Brewster, 131 N. Y. 606.

Unless required by the nature of the employment, it is not negligence to fail to furnish rules.

Morgan v. Hudson River Ore and Iron Co., 133 N. Y. 666.

No action will lie for an injury resulting from failure to obey a warning.

Id.

In making rules a railroad company is bound to use ordinary care

Master and Servant—Continued.

and to guard against such accidents as may be reasonably foreseen. *Berrigan v. N. Y. L. E., etc., R. R. Co.*, 131 N. Y. 582.
No recovery can be had from an injury resulting from a cause which forms one of the risks of employment. *Id.*

The inference of negligence must be drawn from the facts establishing it.

Borden v. Delaware, Lackawanna, etc., R. R. Co., 131 N. Y. 671.

Where negligence is not proven and contributory negligence not disproved, no case is made out. *Id.*

So held in the case where the body was found near the place of the accident. *Id.*

The liability of the master depends upon the character of the order given or act performed.

Hankins v. N. Y., Lake Erie, etc., R. R. Co., 142 N. Y. 416.

Where the duty of performance rests upon the master he is liable for the manner of or failure in performance. *Id.*

Master is liable to a fireman for failure of train dispatcher to give correct orders. *Id.*

The duty of the master cannot be shifted by the adoption of rules and regulations. *Id.*

It is not the master's duty to repair a rope used to raise coal from the hold of a vessel where any weakening of the rope would have become apparent to the deceased upon inspection, and a new one could have been procured upon his request.

Cregan v. Marston, 126 N. Y. 568.

Where there are two possible causes of injury, the one upon which defendant is charged must be proven.

Grant v. Pennsylvania & N. Y. Canal R. R. Co., 133 N. Y. 657.

Employer is not bound to instruct employe where the latter is acquainted with the use of the machinery.

White v. Witteman Lithographic Company, 131 N. Y. 631.

Railroad is not liable for the misuse of its tracks by employe.

Finnell v. Delaware, Lackawanna, etc., R. R. Co., 129 N. Y. 669.

Interference with access to fire-escape, where there was no proof that any one was turned back by reason of them, does not establish negligence.

Paruley v. Steam Gauge & Lantern Co., 131 N. Y. 90.

So held also of a chute at the foot of a fire-escape, the evidence not showing injury from this cause. *Id.*

So held also of the absence of a scuttle in the roof which nobody tried to reach. *Id.*

Where the machinery used for a certain purpose is proper, the company is not liable for its misuse by a servant.

Flood v. Western Union Tel. Co., 131 N. Y. 603.

Master and Servant—Continued.

The doctrine that the employe takes the risk of his occupation is subject to qualification that master must promulgate regulation to protect employes from negligence of co-servants.

Abel v. Delaware & Hudson Canal Co., 128 N. Y. 662.

A charge that a jury, in a suit against a railroad company for causing the death of a repairman under a car, were to determine whether the company discharged its duty in this respect, the rules of other companies as well as its own having been proved, but that the jury were not to find a rule, proper or improper, because some other company had accepted or rejected it, *held* proper. *Id.*

One who continues in employment with knowledge of risk accepts the method of using apparatus.

Reichel v. N. Y. Central, etc., R. R. Co., 130 N. Y. 682.

Negligence cannot be presumed from the fact that rules are not adhered to, where sufficient help is given. *Id.*

Where a master selects an appliance according to his judgment and that of skilled men, he is not liable.

Harley v. Buffalo Car Mfg. Co., 142 N. Y. 31.

Where the master furnished sufficient appliances, he is not liable for the failure of employe to use them. *Id.*

The master is not liable for weakness of appliances not visible to ordinary observation where they have been used in the past with safety. *Id.*

One is guilty of contributory negligence who goes to work on a machine with knowledge of defects and without being directed so to do. *Schulz v. Rohe*, 149 N. Y. 132.

Although a master knew of other defects in a machine, he is not chargeable with negligence for defects which he had no notice of. *Id.*

A master is not liable for the neglect of an engineer to make a repair which he has been directed so to do. *Id.*

Reasonable care in furnishing materials and implements is required of the master.

Carlson v. Phoenix Bridge Co., 132 N. Y. 273.

Reasonable inspection is required of implements furnished. *Id.*

No action will lie for injury where the defect in an implement could not be discovered either in making it or in external examination. *Id.*

Unlawful interference with another's right of service renders a party liable for damages.

Lawyer v. Fritcher, 130 N. Y. 239.

Where consent to dispense with services is obtained by fraud it is void. *Id.*

III. LIABILITY FOR ACTS OF SERVANTS.

Case where failure to close the doors through which deceased

Master and Servant—Continued.

- fell overboard and was drowned, was negligence of a fellow-servant. *Geoghegan v. Atlas S. S. Co.*, 146 N. Y. 369.
- A foreman determining that scaffold which he has helped to construct is safe is a co-servant of employees and the master is not liable. *Kimmer v. Webber*, 151 N. Y. 417.
- An assistant yardmaster in charge of the switch-engine is a fellow-servant of a car repairer employed in same yard. *Corcoran v. Delaware, Lackawanna, etc., R. R. Co.*, 126 N. Y. 673.
- In case of a sudden exigency a servant may do things in the interest of his master which transcend his usual authority. *Marks v. Rochester R. Co.*, 146 N. Y. 181.
- Failure of a brakeman to be at his post upon cars shunted upon a track for inspection, resulting in the death of a co-employee engaged in the work of inspection, is negligence of a fellow-servant. *Potter v. N. Y. Central, etc., R. R. Co.*, 136 N. Y. 77.
- Case in which injury was caused by the negligence of plaintiff's fellow-servants in failing to properly adjust hooks of dump car. *Söderman v. Kemp*, 145 N. Y. 427.
- While engaged in unloading defendant's ship plaintiff was injured in consequence of the dropping of the wheels of his truck into an opening between the skid and its mouthpiece, *held*, negligent act of plaintiff's fellow-servants. *McCampbell v. Cunard Steamship Co.*, 144 N. Y. 552.
- A gang boss over 40 or 50 men, who is not shown to be charged with any duty as to furnishing materials to them, does not act as the representative of the master in respect thereto. *Keenan v. N. Y., L. E. & W. R. R. Co.*, 145 N. Y. 190.
- A servant who sustains an injury from the negligence of a superior agent, engaged in the same general business, cannot maintain an action against the master. *Id.*
- An act not performed within the scope of employment makes an agent liable. *Mulligan v. N. Y. & Rockaway Beach Ry. Co.*, 129 N. Y. 506.
- The act of the agent is not in the performance of duty so as to render the master liable. *Id.*
- Where the agent acts on behalf of the police, such act is outside his scope of duty. *Id.*

IV. COMPENSATION.

Measure of damages in an action for a wrongful discharge.

Watson v. Russell, 149 N. Y. 388.

Application of the rule of a person who takes the benefit of the services of another is bound to pay therefor.

Parshley v. Third M. E. Church in Brooklyn, 147 N. Y. 583.

Master and Servant—Continued.

When obligation to pay in specific articles of property for services changes to payment by money.

New York News Pub. Co. v. National Steamship Co., 148 N. Y. 39.

When the preponderance of evidence showed value of services, it was not error for the court to charge that defendants were bound to pay plaintiffs something.

Metz v. Luckemeyer, affirmed without opinion, 128 N. Y. 682.
Laborers in the penal, reformatory, eleemosynary or educational institutions of the state are not paid in accordance with chapter 380 of 1889.

Drake v. State, 144 N. Y. 414.

Person who has conducted first-class boarding-houses in the same city is competent to testify to value of services of a house-keeper.

Edgecomb v. Buckhout, 146 N. Y. 332.

Evidence of the value of sewing is admissible where such was part of services rendered.

Id.

Where the owner accepts the order of contractors constructing his building payable to a third person, such third person cannot recover on the order where the contractors fail to complete their work and it is completed by the owner, unless it is shown that a balance remains in the owner's hands.

Beardsley v. Cook, 143 N. Y. 143.

Employment at a certain rate per year is a hiring at will and at any time may be terminated.

Martin v. New York Life Ins. Co., 148 N. Y. 117.

In an action for salary, where it appears plaintiff was overpaid because of mistakes which were not discovered until after the termination of the employment, such settlements may be opened so far as to correct the mistakes.

Conville v. Shook, 144 N. Y. 686.

Chapter 380, Laws 1889, regulating the rate of wages on public works in the state, construed.

Drake v. State, 144 N. Y. 414.

Circumstances under which money given to employe is to be considered a gift.

Pickslay v. Starr, 149 N. Y. 432.

Maxims ; See Equity.

Measure of Damages; See Damages.

Mechanic's Lien.

I. GENERALLY.

II. UNDER SPECIAL STATUTES.

I. GENERALLY.

An order to one who furnished materials has preference over a lien not filed when order was given.

Stevens v. Ogden, 130 N. Y. 182.

Mechanic's Lien—Continued.

Proof of filing and contents of a mechanic's lien, sufficient.

Hunter v. Walker, affirmed on opinion, 128 N. Y. 668.

A complaint must be alleged in an action foreclosing a mechanic's lien by a materialman that there was a contract between the owners and contractors, and that a sum remained unpaid.

Raabe v. Squier, 148 N. Y. 81.

The requirements of the Mechanic's Lien Law as to the consent of the owner of the building to the performance of labor or furnishing material by a lien law, considered.

Hankinson v. Vantine, 152 N. Y. 20.

A County Court has jurisdiction of action to foreclose mechanic's lien where property is situated in the county.

Raven v. Smith, 148 N. Y. 415.

Where an owner completes a contract on behalf of the contractor, a sub-contractor is entitled to a lien on the difference between cost of completion and contract price.

Ogden v. Alexander, 140 N. Y. 356.

Completion of work by owner may be justified upon assignment by the contractor after abandonment to the owner. *Id.*

After the sale of premises on a foreclosure sale not accompanied by deed where mortgagee remains to complete building and sub-contractor cannot foreclose a mechanic's lien where amount for the work has been paid the contractor by the mortgagee.

Robbins v. Arendt, 148 N. Y. 673.

What statement was necessary to render notice of mechanic's lien void. *Ringle v. Wallis Iron Works*, 149 N. Y. 439.

A statement that work was completed will not invalidate a lien where there is an omission of a small part of the work which was unintentional. *Id.*

A statement that work was performed means a substantial performance. *Id.*

Consent required by the Mechanic's Lien Law on the part of the owner in order to charge his property with the work performed thereon need not be expressly given, but may be implied.

Cowen v. Paddock, 137 N. Y. 188.

When the owner, upon learning of the work, protests against it and forbids its continuance, his failure to actually eject the contractor does not make him liable. *Id.*

Where a contractor has substantially proceeded to a point in the work where by the terms of his contract he is entitled to payment of an installment, a materialman is entitled to a lien upon such installment less the sum necessary to fully bring the work to the stage at which such installment is payable.

Foshay v. Robinson, 137 N. Y. 134.

Under a building contract twenty per cent. of the contract price was to be retained until the buildings were completed; the contractor abandoned the work when he had paid for that

Mechanic's Lien—Continued.

done, except the twenty per cent., and the owners finished it at a cost greater than the contract price, *held*, that a lien for materials furnished the contractor, filed after he had abandoned the work, attached to nothing.

Kelly v. Bloomingdale, 139 N. Y. 343.

The contract, however, providing that the owners were not bound to make any payment until satisfied that materialmen had been paid, *held*, that a lien filed before the contractor abandoned the work, and when an amount more than sufficient to satisfy it was due him, attached. *Id.*

Where payment of an installment due is refused, performance of contract may be refused.

Thomas v. Stewart, 132 N. Y. 580.

But if the contractors were in default the lienors were entitled to the difference between the amount unpaid upon default and that required to complete contract. *Id.*

Where there is nothing due until complete performance, a lien filed prior to that time does not attach.

Hollister v. Mott, 132 N. Y. 18.

Where material is furnished to one joint contractor with assent of the other, a lien for unpaid balance may be asserted against both. *Id.*

Naming only one of the contractors in the lien did not invalidate it. *Id.*

Materialman as sub-contractor is entitled to priority over other contractors. *Id.*

It is not a condition precedent to the enforcement of a bond given to discharge a mechanic's lien that a judgment in form against the property should be recovered.

Morton v. Tucker, 145 N. Y. 244.

The complaint in such an action should be in the usual form, but should allege the giving of the bond and discharge of the lien, and demand relief against the persons who executed the bond. *Id.*

When lien may be filed for materials though contract was made without state between non-residents.

Campbell v. Coon, 149 N. Y. 556.

A sub-contractor's lien after a contractor abandons work attaches to balance of contract price after deducting cost of completion. *Id.*

While the Mechanic's Lien Law is to receive a liberal construction it must not be unfairly extended.

Spruck v. McRoberts, 139 N. Y. 193.

The consent of the owner could not be implied from his not seeking out the trespasser and informing him of his rights. *Id.*

Lien could not be defeated although the contract for sale contained a stipulation as against one not in privity with either of

Mechanic's Lien—Continued.

parties to lien that if any mechanic's lien was filed it should be subject to the lien and claim of the vendor.

Miller v. Mead, 127 N. Y. 544.

Such stipulation does not destroy the owner's consent that the houses shall be built nor diminish its effect, nor does it lessen the obligee on resting upon the vendee to build them, and the rights given by the statute cannot be defeated by such stipulation. *Id.*

The extent to which a lien filed by sub-contractor or materialman attaches, set forth.

Van Clief v. Van Vechten, 130 N. Y. 571.

A lienor is bound to prove performance. *Id.*

Inadvertent omission of a few slight things will not prevent recovery of contract price. *Id.*

Where the contractor willfully refuses to perform, the lienor must show performance entitling the contractor to payment. *Id.*

Where the owner completed the building, the lien attached to the difference between the sum unpaid on contract and cost of completion. *Id.*

II. UNDER SPECIAL STATUTES.

A valid lien under the act of 1885 cannot be acquired after the death of the owner.

Tubridy v. Wright, 144 N. Y. 519.

Under Laws 1885, chapter 342, the statutory incumbrance is imposed on real estate only when the work is performed, and it is incumbent on the contractor or materialman to assure himself that the person with whom he is contracting has in fact an interest in the land.

Spruck v. McRoberts, 139 N. Y. 193.

The provision of the Mechanics' Lien Law that actions thereunder shall be tried in the same manner as actions for foreclosure of mortgages is not violative of article 1, section 2 of the Constitution of 1846.

Schillinger Fire Proof Cement & Asphalt Co. v. Arnott, 152 N. Y. 584.

An action to foreclose a mechanic's lien not triable by jury by release of realty from lien by a deposit or otherwise. *Id.*

If the defendant wishes a jury trial upon an issue of fact, he should apply to the court to frame issues. *Id.*

Merger.

When a conveyance of mortgaged premises by mortgagor to mortgagee after the assignment by the latter of the mortgage creates no merger as against the assignee.

Curtis v. Moore, 152 N. Y. 159.

Militia ; *See Courts-Martial.*

An order of the governor disbanding a militia company is valid and is not reviewable by *certiorari* in the courts.

People ex rel. Leo v. Hill, 126 N. Y. 497.

Armorer and janitor of armories are in the military and not the civil service.

Matter of Bryant v. Palmer, 152 N. Y. 412.

Section 179 of the Military Code as amended in 1896, as to the payment of wages of armorers by the country, is constitutional. *Id.*

Mines.

Under a grant of mineral ores, granite does not pass.

Armstrong v. Lake Champlain Granite Co., 147 N. Y. 495.

Granite will not pass under a deed where it was the intention of the parties that there should be underground workings. *Id.*

The discovery of a mine on state lands and filing of notice pursuant to Laws 1890, chapter 411, with the consent of the commissioners of the land office, does not give a legal title to mine or minerals so as to support ejectment.

Moore v. Brown, 139 N. Y. 127.

A coal mining agreement, by the terms of which the lessee was only to take and pay for such portion of the coal as should prove to be merchantable and of specified qualities, is an executory agreement and not a deed.

Genet v. Delaware & Hudson Canal Co., 136 N. Y. 593.

The Pennsylvania rule that a transfer of all the coal in, on or under a given described surface, even though taking the form of a lease and terminable in a fixed number of years, is a sale of the coal and a grant of it in fee as a severed parcel of land, —applied. *Id.*

Upon consideration of all the terms of such agreement, *held*, that there was an implied covenant that the lessee would not negligently or willfully incapacitate itself from taking out more than the minimum quantity on which, by the terms of the lease, it must pay a royalty, and that for improper and negligent mining resulting in the destruction of the mine, it was liable to the lessor upon such implied terms. *Id.*

Misdemeanors ; *See Criminal Law.***Misjoinder ;** *See Pleading.***Misrepresentations ;** *See Agency ; Criminal Law ; Estoppel ; Fraudulent Representations ; Sales ; Vendor and Purchaser.*

Mistake; *See Cancellation; Payment; Reformation of Instruments; Sales; Vendor and Purchaser.*

Proof of mistake must be special to authorize a reformation of contract.

Christopher & Tenth St. R. R. Co. v. Twenty-third St. R. Co., 149 N. Y. 51.

Where refusal to allow amendment on ground of mistake is harmless. *Id.*

Equity will afford relief where there is both fraud and a mistake of law. *Haviland v. Willets*, 141 N. Y. 35.

A person accepting payments on an instrument sought to be cancelled is estopped from claiming relief as to payments made. *Id.*

Moneyed Corporations; *See Banks and Banking; Insurance.*

Money Had and Received; *See Contracts; Money Paid.*

Money Paid.

A vendee may recover the money paid on the contract of sale where there is a failure of consideration.

Flandrow v. Hammond, 148 N. Y. 129.

It is immaterial that the moneys paid in satisfaction of a judgment in replevin were not the identical moneys received for the goods. *Converse v. Sickles*, 146 N. Y. 200.

Action will lie for recovery when money is paid to sheriff under protest. *Freeman v. Grant*, 132 N. Y. 22.

Where money to pay a bond and mortgage has been wrongfully received by a bank, the restitution thereof to proper parties may be compelled.

People v. Madison Square Bank, 142 N. Y. 644.

A payment of an assessment to enable the person making the payment to close a sale of property, is voluntary, and will not sustain an action to recover the money back on the ground of the illegality of the assessment.

Vaughn v. Village of Port Chester, 135 N. Y. 460.

The owner of land incumbered by an assessment for a local improvement apparently valid may in good faith pay the assessment, and thereafter on discovering that it was unauthorized and illegal recover back the money paid.

Tripler v. Mayor, etc., of N. Y., 139 N. Y. 1.

Mortgages; *See Covenants; Chattel Mortgages; Deeds; Estoppel; Foreclosure; Husband and Wife; Railroads; Recording Conveyances; Vendor and Purchaser; Subrogation.*

I. NATURE.

II. VALIDITY AND INTERPRETATION.

Mortgages—Continued.

III. PRIORITY AND RECORDING.

IV. RIGHTS OF MORTGAGOR.

V. RIGHTS OF MORTGAGEE.

VI. RIGHTS OF PURCHASER OF PREMISES.

I. NATURE.

Lien of mortgagee extends to award made for property taken for public purposes. *Gates v. De La Mare*, 142 N. Y. 307.

When mortgage is one of indemnity only, and an action to foreclose the same cannot be maintained until the mortgagee has paid the whole or part of a bail bond.

Maloney v. Nelson, 144 N. Y. 182.

A deed given to secure the repayment of a loan is regarded as a mortgage. *Id.*

But the fact that the grantor did not expressly covenant to repay was a circumstance to be considered. *Id.*

Non-payment within time specified cannot convert a mortgage into an absolute deed. *Id.*

In equity, a conveyance absolute on its face may be shown by parol evidence to be a security.

Barry v. Colville 129 N. Y. 302.

It is settled in this state that the title of the mortgagor to the land is not changed by the mortgage.

Sexton v. Breese, 135 N. Y. 387.

Such mortgagee takes possession of the land subject to any previous disposition of a growing crop of grain. *Id.*

A purchaser of a growing crop claiming under bill of sale has a superior title to a mortgagee subsequently taking possession. *Id.*

A temporary administrator has no authority to mortgage real estate of decedent. *Duryea v. Mackey*, 151 N. Y. 204.

Consent of the attorneys for the parties cannot give jurisdiction to surrogate to make order authorizing temporary administrator to mortgage. *Id.*

• Remaindermen are not estopped from questioning the validity of mortgage who took no part in the contest. *Id.*

II. VALIDITY AND INTERPRETATION.

An inaccurate description of the premises in a mortgage is cured by a reference therein to the deed to the mortgagor which gave a correct description.

Bernstein v. Nealis, 144 N. Y. 347.

A mortgage is not merged by a judgment of foreclosure so far as to blot out its record or relieve one looking at the judgment and deed given on the sale under it from its proper effect. *Id.*

Mortgages—Continued.

Case in which conveyance of land made to executrix individually, and that she did not sign the bond in her official character, do not render the mortgages void.

Roarty v. McDermott, 146 N. Y. 296.

Father conveyed a farm to his two sons in consideration of an indebtedness to them, and, later, to prevent their losing it by speculation or by raising money thereon, induced each of them to give him a mortgage; *held*, such mortgages were without consideration.

Baird v. Baird, 145 N. Y. 659.

When equity will impress a lien upon the lands omitted from mortgage which may be enforced in an action between the original parties to foreclose without reformation of mortgage.

Sprague v. Cochran, 144 N. Y. 104.

An agreement to give a mortgage as security for the repayment of advances made on the faith thereon need not be in writing.

Id.

A payment by heirs of a mortgagor who have inherited a part of the mortgaged premises, made to prevent a foreclosure of the mortgage, does not arrest the running of the statute against the lien of the mortgage upon another portion conveyed by the mortgagor.

Murdock v. Waterman, 145 N. Y. 55.

The authorized alteration of a mortgage made by the attorney for the mortgagee who drew it, but without his knowledge, so as to cover obligations not within the agreement for its execution, does not impair the instrument for obligations intended to be secured.

Gleason v. Hamilton, 138 N. Y. 353.

Where evidence establishes a satisfaction of mortgage, no claim therein will be allowed.

Van Slooten v. Wheeler, 140 N. Y. 624.

Satisfaction-piece is *prima facie* evidence that the mortgage was paid.

II.

When a certificate of acknowledgment read in evidence requires submission of question to jury.

Albany Co. Sav'gs Bk. v. McCarty, 149 N. Y. 71.

When mortgage which has been paid cannot be reissued by parol.

Bogert v. Bliss, 148 N. Y. 194.

Property of infant remaindermen cannot be mortgaged by trustee by order of court.

Losey v. Stanley, 147 N. Y. 560.

Such mortgage may be collaterally assailed for want of jurisdiction in an action to foreclose it.

Id.

An instrument in the ordinary form of a mortgage, reciting a money consideration of \$600 is valid and enforceable, although in the defeasance clause the amount of the mortgage is left a blank.

Burnett v. Wright, 135 N. Y. 543.

The defeasance need not be in writing, and may be established by parol.

Id.

Mortgages—Continued.**III. PRIORITY AND RECORDING.**

The filing of a *lis pendens* in an action to restrain the violation of restrictive covenants of an agreement concerning the use of land, gives no priority to a judgment for costs in such action.

Crocker v. Lewis, 144 N. Y. 140.

Where a subsequent mortgage is executed after satisfaction of the prior one, beneficiaries under the prior mortgage cannot claim foreclosure where they are not provided for in the second mortgage.

Townsend v. Rackham, 143 N. Y. 516.

Unless there is a liability due in his favor a third party cannot enforce a contract by which he is benefitted.

Id.

Existence and record of mortgage is not proof of delivery to other than the mortgagor.

Id.

Execution of a second mortgage does not destroy right to make advance upon faith of a first mortgage.

Farr v. Nichols, 132 N. Y. 327.

Where there is a provision for foreclosure at request of a majority of landholders, one bondholder cannot sue to recover the principal sum.

Batchelder v. Council Grove Water Co., 131 N. Y. 42.

A purchase-money mortgage is regarded as a continuation of the vendor's lien, and is paramount to a mortgage executed by the purchaser at the same time to a third person.

Boies v. Benham, 127 N. Y. 620.

It seems that the grantor may by agreement waive such prior right or estop himself from asserting it, and thus subject his lien to the preference of the other mortgage or place it on an equal footing with it.

Id.

A parol agreement between two grantors, taking back separate purchase-money mortgages from the grantee, to the effect that one of them shall have priority over the other, which agreement is affected by the prior delivery and prior recording of the mortgage intended to have precedence, is valid.

Collier v. Miller, 137 N. Y. 332.

Where both such mortgages were subsequently assigned to different assignees, recording had not so changed the rights of the respective assignees as to prevent each from standing in place of his original assignor.

Id.

Priority of record in such cases raises a presumption of priority of delivery.

Id.

IV. RIGHTS OF MORTGAGOR.

When equity will decree a cancellation of a mortgage at the suit of a mortgagor when owner directed cancellation under his will.

Gibbins v. Campbell, 148 N. Y. 410.

A judgment of foreclosure in a foreign state, in an action in which the mortgagor did not appear, while having no effect to create

Mortgages—Continued.

a personal liability on the bond, is conclusive as to the ownership of the mortgage. *Matter of James*, 146 N. Y. 78.

The transfer by a mortgagee of a promissory note of the mortgagor which was to be applied on the mortgage, when paid, operates as a payment so long as it remains in the hands of the transferee. *Fitch v. McDowell*, 145 N. Y. 498.

The holder of such note takes no interest in the mortgage and is not entitled to priority of payment over the holder thereof. *Id.*

An assignee of a mortgage has a valid lien as against a purchaser from the mortgagee, to whom the mortgaged property was conveyed after the assignment.

Curtis v. Moore, 152 N. Y. 159.

A conveyance of the mortgaged premises by the mortgagor to the mortgagee after the latter has assigned the mortgage creates no merger of the mortgage as against the assignee. *Id.*

An assignment of a mortgage need not be recorded as against a subsequent purchaser of the premises; but only as against a subsequent purchaser of the mortgage itself. *Id.*

V. RIGHTS OF MORTGAGEE.

Where plaintiff furnished money to buy the property, and defendant took title, the former may foreclose mortgage given to secure purchase price. *Smith v. Lennon*, 131 N. Y. 560.

The fact that both were to share in the profits of a resale does not constitute partnership. *Id.*

The liability of a mortgage trustee upon uncollected checks, which had been taken upon a sale on foreclosure of the mortgaged property, is terminated by a disaffirmance by the bondholders of such sale. *Harrison v. Union Trust Co.*, 144 N. Y. 326.

An action cannot be maintained to compel the trustee to convey to the purchaser on the foreclosure sale, where the decree on foreclosure has already directed such conveyance. *Id.*

When covenant of grantee assuming payment of mortgage inures to benefit a mortgagee. *Wager v. Link*, 150 N. Y. 549.

Where under a mortgage to secure future advances the mortgagee is bound to make such advances, his lien will not be postponed as to advances made subsequent to a later mortgage to another, of which he had notice. *Hyman v. Hariff*, 138 N. Y. 48.

A subsequent mortgagee is not prejudiced by notice of prior unrecorded mortgage after he receives his mortgage and prior to his recording it.

Constant v. University of Rochester, 133 N. Y. 640.

Rights of junior mortgagee, who was not made party to an action made prior to the mortgage,—considered.

Denton v. Ontario County Nat. Bk., 150 N. Y. 126.

A party is not chargeable with knowledge of the commencement

Mortgages—Continued.

of a foreclosure action obtained by his attorney while working for another. *Id.*

A bondholder may maintain an action for specific performance of a division in a bond given by organizers of the railroad that they will convey certain property to the trustee.

O'Beirne v. Alleghany & Kinzua R. R. Co., 151 N. Y. 372.

When *lis pendens* filed in an action for specific performance of an agreement to sell land, is no notice to one who takes a mortgage on such premises pending the action.

Oliphant v. Burns, 146 N. Y. 218.

The assignee of a mortgagee has no greater rights than the original mortgagee.

Rapps v. Gottlieb, 142 N. Y. 164.

No title is acquired by the assignee of a mortgage obtained by fraud. *Id.*

VI. RIGHTS OF PURCHASER OF PREMISES.

A mortgage executed by a husband who holds by the entirety with his wife is effectual to cover his interest, and the purchaser on foreclosure thereof succeeds thereto and becomes a tenant in common with the wife subject to her right of survivorship.

Hiles v. Fisher, 144 N. Y. 306.

Motions ; *See Practice.*

Municipal Corporations ; *See Constitutional Law ; Counties ; Highways ; New York City ; Offices ; Sewers ; Supervisors ; Tenement Houses ; Towns ; Taxation.*

I. CHARTER AND ORDINANCES.

II. POWERS.

III. CONTRACTS.

IV. LIABILITY.

V. OFFICERS AND AGENTS.

VI. ASSESSMENTS.

VII. RAILROAD AID.

VIII. PARTICULAR CITIES.

I. CHARTER AND ORDINANCES.

An ordinance requiring trains to stop before crossing certain streets is reasonable on its face.

City of Buffalo v. N. Y., L. E. & W. R. R. Co., 152 N. Y. 276.

An ordinance requiring railroad trains to cross the streets of a populous city at a rate of speed not exceeding six miles an hour is reasonable on its face, and is not invalidated by the fact that it exempts from its operation trains of a belt line operated for local traffic at a fixed fare. *Id.*

It is no defense to an action for violation of a municipal ordinance

Municipal Corporations—Continued.

regulating the speed of trains that others are violating such ordinance and are not prosecuted. *Id.*

The publication in full of the preamble and resolution passed by a common council which give all the information required to property owners is a sufficient notice of the determination within the statute.

Matter of City of Rochester, 136 N. Y. 83.
Legislature may authorize the passage of an ordinance regulating burials within the city limits.

People ex rel. Oak Hill Assoc. v. Pratt, 129 N. Y. 68.
Such power may be exercised as the public welfare requires. *Id.*
Section 14 of article 8 of the Constitution that payment of cities to private charitable institutions may be authorized by the legislature,—construed.

People ex rel. Inebriates' Home v. Comptroller of Brooklyn, 152 N. Y. 399.
The provision of the section that no such payments shall be made for any inmate not received and retained pursuant to rules established by the state board of charities operates from the time such rules are adopted. *Id.*

Running cars on a street other than the one specified is not complying with an ordinance.

Mayor, etc., of N. Y. v. Dry Dock, East Broadway, etc., R. Co., 133 N. Y. 104.

Where the general power and authority of a statute are not violated, violation of one provision will not invalidate an act.

Hoag v. Town of Greenwich, 133 N. Y. 152.
A statute conferring jurisdiction operates only in cases occurring after passage of the act.

Matter of Delaware & Hudson Canal Co., 129 N. Y. 105.
A provision of a city charter which declares it unlawful for any member or members of the common council, whether a committee or otherwise, to make any disbursement of corporate money unless previously ordered by the common council, does not curtail or affect the power of the common council.

Kramrath v. City of Albany, 127 N. Y. 575.
The rule which prevents the common council of a city from delegating power will not prevent their authorizing a committee to fit up a room for the use of public officers. *Id.*

A power to grant a privilege to one is inconsistent with the possession on the part of another of an absolute right to exercise such privilege. The requirement that a person must secure leave from some one to entitle him to exercise a right, carries with it, by natural implication, a discretion on the part of the other to refuse to grant, if, in his judgment, it is improper or unwise to give the required consent.

People ex rel. Schwab v. Grant, 126 N. Y. 473.

Municipal Corporations—Continued.**II. POWERS.**

A grant by municipal authorities to a gas company to lay its mains in the streets and highways includes those streets subsequently laid out.

People ex rel. Woodhaven Gas Co. v. Deehan, 153 N. Y. 528.

A change of grade of a street is not a taking of private property entitling owners to damages.

Talbot v. N. Y. & H. R. R. Co., 151 N. Y. 155.

In proceedings to lay out a street under the General Village Act the petition must give an accurate description of the lands to be taken.

People ex rel. Eckerson v. Trustees of Haverstraw, 137 N. Y. 88.

The provisions of the Refunding Act, Laws 1878, chapter 75. Laws 1889 chapter 526, authorizing any city to extend its bonded debt, by the exchange of new bonds or by the sale of new bonds and use of their proceeds in payment of the existing debt—authorized a city to pursue the latter course, notwithstanding a provision in its charter.

City of Poughkeepsie v. Quintard, 136 N. Y. 275.

An action cannot be maintained by a taxpayer to restrain the purchase of property by municipal authorities on the ground that the proposed price is an extravagant one, but only on ground of fraud, collusion or bad faith.

Ziegler v. Chapin, 126 N. Y. 342.

It seems that an allegation of fraud and misrepresentations on the part of the proposed seller will not sustain the action. *Id.* Such action may be maintained, however, where it appears that, under the statutes, the contemplated purchase by the municipal officers is beyond their authority. *Id.*

Laws 1889, chapter 475, section 19, in regard to opening a street, *held*, permissive.

People ex rel. Comstock v. Mayor, etc., of Syracuse, affirmed in opinion below in 128 N. Y. 632.

Commissioners may discontinue proceedings for street opening upon request of majority of those interested.

Matter of Board of Street Opening, etc., of New York, 133 N. Y. 436.

Cost of school-house is not limited to amount of bonds issued to defray such cost.

Pierce, Butler & Pierce Mfg. Co. v. Bleckwenn, 131 N. Y. 570.

Where common council acts within limits of charter, the treasurer cannot refuse to pay out funds. *Id.*

Where a city owned one-half of a pier and plaintiff the other half, plaintiff was entitled to a decree for removal of structure interfering with use of his half.

Hill v. Mayor, etc., of N. Y., 139 N. Y. 495.

The provisions of the Consolidation Act, section 706, do not au-

Municipal Corporations—Continued.

thorize the selection of half of a pier to the injury of the owner of the other half. *Id.*

Common council can authorize the erection of an awning.

Hoey v. Gilroy, 129 N. Y. 132.

An awning which conforms to the requirement of an ordinance is not an obstruction. *Id.*

III. CONTRACTS.

A judgment roll in an action in which a judgment had been obtained against a municipal corporation for the personal injury caused by the negligence of contractor entitled municipality to direction of the verdict in an action brought to obtain reimbursement. *Mayor v. Brady*, 151 N. Y. 611.

The sureties for the performance of a municipal contract are not released from claim for damages for personal injuries arising from negligence by the omission of municipality to retain contract money until settlement of all claims. *Id.*

Circumstances under which, *held* that an illegal contract was not cured by chapter 557 of 1880 and chapter 648 of 1881.

Poth v. Mayor, 151 N. Y. 16.

A contractor has no action against a city for damages for delay caused by the rejection of materials.

Montgomery v. Mayor, 151 N. Y. 249.

Where a claim is audited in compliance with a writ of *mandamus*, its validity cannot be questioned in collateral proceedings.

Ashton v. City of Rochester, 133 N. Y. 187.

Their remedy is to apply to be made parties and to appeal from the judgment awarding the writ, or to move for a rehearing. *Id.*

When the court will not compel the payment of public moneys to a private corporation under an appropriation made for a special and limited purpose.

People ex rel. Inebriates' Home v. Comptroller of Brooklyn, 152 N. Y. 399.

Deposit cannot be forfeited until notice of award has been given.

Erving v. Mayor, etc., of New York, 131 N. Y. 133.

The mere fact that a person is the lowest bidder does not entitle him to an award. *Id.*

The duty of the officials to examine the proposals and award the contract is judicial in its nature. *Id.*

Proof merely that a lower bid than the one accepted was made does not impugn the acceptance.

Gilmore v. City of Utica, 131 N. Y. 26.

When a contractor is without adequate remedy at law, and is entitled to a *mandamus* requiring the completion of the collection or the issue of bonds for work performed in improvements.

People ex rel. Ready v. Mayor of Syracuse, 144 N. Y. 63.

Municipal Corporations—Continued.

Unbalanced bid considered and held that rejection of bid could not be reviewed in action by taxpayer suing for waste.

Moran v. Trustees of White Plains, affirmed without opinion, 128 N. Y. 578.

IV. LIABILITY.

An action may be maintained against a city for damages for discharging sewage through creeks of adjacent towns to the detriment of lands along such creeks.

Hooker v. City of Rochester, affirmed, 126 N. Y. 635.

A city cannot empty its sewers upon private property without acquiring the right so to do.

N. Y. Central, etc., R. R. Co., v. City of Rochester, 127 N. Y. 591.

The cities of New York and Brooklyn were liable for negligence causing injury to a passenger over the Brooklyn bridge before the enactment of Laws 1891, chapter 128, section 7.

Reid v. Mayor, etc., of N. Y., 139 N. Y. 534.

A mistake on the part of the common council of a city as to the extent of their power to authorize the license of fireworks in the streets, and in the construction put by common consent upon the ordinance passed, did not exonerate the city from liability.

Speir v. City of Brooklyn, 139 N. Y. 6.

Liability of an incorporated village which maintains water-works for failure to keep the system in order, considered.

Springfield Fire & Marine Ins. Co. v. Village of Keeseville, 148 N. Y. 46.

What defect inside walk in a municipal corporation is not chargeable with negligence by omitting to repair.

Beltz v. City of Yonkers, 148 N. Y. 67.

What depression in sidewalk which caused no previous accident is not sufficient to charge municipality with negligence. *Id.*

Provisions of Laws 1886, chapter 572, requiring presentation of claims for personal injuries "against the mayor, aldermen and commonalty of any city in this state having 50,000 inhabitants or over," apply to all cities of the state having the requisite number of inhabitants.

Curry v. City of Buffalo, 135 N. Y. 366.

A provision of a city charter requiring presentation of claims to the common council and regulating the auditing thereof, is consistent with the provisions of the act of 1886, and both can have operation. *Id.*

The commencement of the action cannot be considered as a notice within the statute. *Id.*

A village is not relieved from liability for negligently constructing a sewer so as to discharge its contents on the premises of a

Municipal Corporations—*Continued.*

property owner by the fact that its trustees exceeded their authority.

Stoddard v. Village of Saratoga Springs, 127 N. Y. 261.

A municipal corporation may be bound upon implied contracts made by its agents acting either within their power or under the charter. *Kramrath v. City of Albany*, 127 N. Y. 575.

A corporation, like an individual, is liable upon a *quantum meruit* when it has enjoyed the benefit of the work performed or goods purchased. *Id.*

When discharge of fireworks was a public nuisance and the city was liable for the resulting damages.

Tripler v. Mayor, etc., of N. Y., 139 N. Y. 1.

What is insufficient to raise the question of failure to serve notice of intention to sue municipality.

Werner v. City of Rochester, 149 N. Y. 563.

What is not sufficient to charge the city with constructive notice of the obstruction. *Breil v. City of Buffalo*, 144 N. Y. 163.

Liability for violation of statutes giving preference to honorably discharged soldiers and sailors.

Higgins v. Mayor, etc., of N. Y., 131 N. Y. 128.

The only obligation to an appointee is to compensate him for services rendered while employed. *Id.*

Public officials are subject to penal consequences for disregard of those provisions. *Id.*

Chapter 537 of 1893, relating to the payment of damages caused by the change of grade of streets, is not in contravention of article 3, section 197, of the Constitution.

People ex rel. Purdy v. Fitch, 147 N. Y. 355.

A certificate of reappointment of commissioners under chapter 537 of 1893, held regular. *Id.*

The reappointment of the commissioners was unnecessary under the amendment of 1894. *Id.*

Payment to a *de facto* officer while holding the office and discharging its duties is a defense to an action by the *de jure* officer to recover the salary. *Demarest v. Mayor*, 147 N. Y. 203.

Where the office had previously existed, the fact that persons actually assume it renders them *de facto* officers. *Id.*

Whether men employed in digging a trench in a city street and paid by the city are servants of city is a question of fact.

Wilson v. City of Troy, 135 N. Y. 96.

Where the negligent act is that of the city itself, through one of its officers or departments, the negligent act is imputable to the city. *Id.*

The audit of a claim has not the conclusive effect of a judgment.

Nelson v. Mayor, etc., of New York, 131 N. Y. 4.

When a city is chargeable with notice of obstruction.

Farley v. Mayor, 152 N. Y. 222.

Municipal Corporations—Continued.

Public officers of a municipality charged with the conduct of a local improvement are not responsible to a property owner because the work has not resulted in such benefits and advantages to him as were anticipated.

Garratt v. Trustees of Canandaigua, 135 N. Y. 436.

The court will not, by injunction, control their conduct in regulating the flow of water from a lake into an outlet used for drain unless use is malicious or negligent. *Id.*

Where there are two causes, without the existence of one of which the accident might not have occurred, the concurrence of both must be proven.

Ayres v. Village of Hammondsport, 130 N. Y. 665.

Where a subsequent action is commenced 18 years after a prior one, it is begun too late. *Matter of Druffy*, 133 N. Y. 512.

Where the cause of an accident was shown to exist a week before, the town is liable.

Keane v. Village of Waterford, 130 N. Y. 188.

Under a city charter exempting it from liability for injuries sustained through unsafe condition of the streets unless actual notice of such condition shall have been given to certain specified officers, the word "notice" imports information and may be established by either direct or circumstantial evidence.

McNally v. City of Cohoes, 127 N. Y. 350.

What is not "notice." *Id.*

Where the trustees become vested with power and duties of highway commissioners, the responsibility for their proper performance devolves upon the village.

McSherry v. Trustees of Canandaigua, 129 N. Y. 612.

Notice to commissioner of the condition of a street is notice to the corporation. *Id.*

The illegal official act to prevent which a taxpayer's action will lie is such only as will produce a public injury.

Rogers v. O'Brien, 153 N. Y. 357.

Such an action will not lie in behalf of one wrongfully in possession of city property to prevent its reclamation by one of the city departments. *Id.*

Obligation to keep streets and highways in a safe condition does not apply to a river. *Coonley v. City of Albany*, 132 N. Y. 145.

Where the city charter exempted it, a city is not liable for mere non-performance of its ordinances. *Id.*

An ordinance imposing a penalty not authorized by statute is invalid. *Id.*

One who has title to center of the street is entitled to damages for illegal change of grade without his consent.

Folmsbee v. City of Amsterdam, 142 N. Y. 118.

Formal ordinance on part of a city is not necessary to establish grade of a city. *Id.*

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City authorities have no power to change street grade without consent of abutting owners. *Id.*

The only remedy is by an action for damages. *Id.*

V. OFFICERS AND AGENTS.

A clerk in the office of the city record is subject to dismissal for misconduct.

People ex rel. Higgins v. Grant, affirmed, *it seems*, without opinion, 128 N. Y. 620.

A police officer under charges before police commissioners is entitled to have counsel at his hearing.

People ex rel. Van Hise v. Police Com'rs of Greenbush, affirmed without opinion, 126 N. Y. 623.

General Term of New York Superior Court may reverse an order of police commissioners.

Fisher v. Village of Cambridge, 133 N. Y. 527.

Removal of a boiler inspector without notice or hearing is illegal.

People ex rel. Fox v. Hayden, 133 N. Y. 198.

Certiorari will lie to renew erroneous decision of police commissioners. *People ex rel. Boeckell v. MacLean*, 133 N. Y. 527.

A mayor refusing to make a classification under Civil Service Law may be required so to do by *mandamus*.

Chittenden v. Wurster, 152 N. Y. 345.

Where a public officer, having power to discharge a subordinate notifies him of his suspension, the inaccuracy of the language will not defeat the intended discharge.

Wardlaw v. Mayor, etc., of N. Y., 137 N. Y. 194.

Although a suspension from office is not equivalent to a removal, and does not defeat the right of the incumbent to future salary, he may waive that right by express agreement or by conduct. *Id.*

A public officer, unlawfully removed from office to which another person is appointed, cannot recover from the corporation the compensation incident to the office accruing during the period in which he performed no service, and took no action to be reinstated.

Hagan v. City of Brooklyn, 126 N. Y. 643.

In an action to recover the salary of a public officer, the title to the office necessarily came in question, and cannot so be tried. *Id.*

The reasonableness of a determination of the commissioners of the fire department of New York city may be contested in an action for a penalty for disobedience of such order.

Fire Dept. of New York v. Gilmour, 149 N. Y. 453.

A person appointed to an office without having passed a civil service examination may be discharged without notice or hearing.

People ex rel. Hannan v. Board of Health, 153 N. Y. 513.

The word "incompetency," as used in the act means incapacity. *Id.*

Power of park commissioners of New York city under section

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- 688 of the Consolidation Act to grant a permit to erect bay windows. *Wormser v. Brown*, 149 N. Y. 163.
- The position of assistant warrant clerk in the office of the comptroller of Brooklyn is a confidential position; the incumbent may be discharged without cause. *People ex rel. Crumney v. Palmer*, 152 N. Y. 217.
- What return to a *certiorari* to review an alleged improper dismissal of a fireman, the court cannot go behind. *People ex rel. Miller v. Wurster*, 149 N. Y. 549.
- A city can act only through its officers and agents. *Nelson v. Mayor, etc., of New York*, 131 N. Y. 4.
- Ratification of a fraudulent contract is void. *Id.*
- What constitutes a practical discharge under the Civil Service Law. *McNamara v. Mayor*, 152 N. Y. 228.
- If water commissioners are given power to fix rates for water, also a special rate for extraordinary use, the courts will not restrain the commissioners from cutting off the water for failure to pay special rates. *Brass v. Rathbone*, 153 N. Y. 435.
- Where the premises are in the possession of the tenant who wastes water, the landlord cannot procure an injunction to prevent the cutting off of the supply for failure to pay special rates. *Id.*
- An appointment at a salary payable from a specific appropriation terminates upon notice of exhaustion of the appropriation. *Lethbridge v. Mayor, etc., of New York*, 133 N. Y. 232.
- Taxpayer may maintain an action to restrain illegal official acts. *Peck v. Belknap*, 130 N. Y. 394.
- It is no defense that the person employed was as capable as if the statute had been complied with. *Id.*
- In order to warrant a dismissal for absence, the absence of a policeman must be voluntary and intentional. *People ex rel. Mitchell v. Martin*, 143 N. Y. 407.
- When it appeared that absence was result of temporary mental aberration, the dismissal was error. *Id.*

VI. ASSESSMENTS.

Power of board of assessors to fix district assessment.

People ex rel. Lehigh Valley R. R. Co. v. City of Buffalo, 147 N. Y. 675.

Where real property is assessed for improvement erroneously, the court may send the assessment roll back for correction. *Id.*

When it cannot be said as a matter of law that land abutting on a stream above an improvement was not benefitted. *Id.*

A petition for the paving of a street held void because not actually signed by a requisite number of owners.

Miller v. City of Amsterdam, 149 N. Y. 288.

A decision by the common council that such a petition was

Municipal Corporations—Continued.

signed by the requisite number of property owners may be attacked collaterally. *Id.*

Although a property holder appears at a final hearing on an assessment roll, he is not estopped from attacking the validity of the proceeding. *Id.*

Omission from assessment roll of realty benefitted by improvement is ground for setting aside assessment.

Trimmer v. City of Rochester, 130 N. Y. 401.

A judgment in the case of one assessment does not affect the other assessments. *Id.*

Money collected under an illegal assessment cannot be recovered until the assessment is set aside. *Id.*

When an assessment for paving in a park may include improvements on streets outside park used to furnish proper drainage.

Kittinger v. City of Buffalo, 148 N. Y. 332.

Improvement certificates issued in Long Island City under Laws 1874, chapter 326, are receivable for the purpose of redemption of lands sold. *People ex rel. Oakley v. Bleckwenn*, 126 N. Y. 310.

No assessment can be imposed for grading a street unless laid out or opened as a public highway.

Copcutt v. City of Yonkers, affirmed without opinion, 128 N. Y. 669.

Where an assessment has been levied under New York Consolidation Act (§ 920), the person assessed shall have the right to pay in yearly installments of five per cent. each for twenty years.

People ex rel. Martin v. Gilon, appeal dismissed, 128 N. Y. 651.

Payment of an illegal assessment after proceedings to enforce it by sale is not voluntary. *Poth v. Mayor*, 151 N. Y. 16.

Provisions of section 902 of the Consolidation Act,—construed. *Id.*

The court may open an order of confirmation so as to allow an award to a property owner, who did not appear, upon such terms as are just.

Matter of One Hundred and Eighty-first Street, affirmed without opinion in 126 N. Y. 641.

An action to prevent the creation of a cloud on title by the sale and giving of a lease upon such sale for non-payment of assessment upon lands in the city of New York is prohibited by section 879 of the Consolidation Act.

Scudder v. Mayor, 146 N. Y. 245.

Relief against excessive assessment is by *certiorari*.

Hoffeld v. City of Buffalo, 130 N. Y. 387.

Where assessors act under an error of judgment their action is not necessarily illegal. *Id.*

In a case for such relief in equity the proceedings are valid on their face, but for reason of something extrinsic in the record they are illegal. *Id.*

Municipal Corporations—Continued.

Water rents charged for water actually used by consumers are not taxes, and are valid.

Silkman v. Water Comrs. of Yonkers, 152 N. Y. 327.

When the statute authorizes water rates to be established with reference to the consumption of water, it is not unreasonable for the commissioner to establish it at reduced rates. *Id.*

A motion to set aside a report after it had been confirmed and assessment levied, will not be granted.

Matter of Lexington Ave., 133 N. Y. 673.

No affirmative remedy to vacate or set aside an assessment in the city of New York is given to the landowner, except the special proceedings under the Consolidation Act (§§ 897, 903).

People ex rel. Martin v. Myers, 135 N. Y. 465.

A provision expending a certain sum for street repairs does not prohibit expenses in excess of such sum be raised by assessment.

Gilmore v. City of Utica, 131 N. Y. 26.

Where no substantial injury occurs, an irregularity in notice of improvement will not vitiate an assessment.

Voght v. City of Buffalo, 133 N. Y. 463.

Publication for five successive week-days, excluding Sundays, is sufficient compliance. *Id.*

Where the amount assessed rests in discretion of the assessors, their determination is final. *Id.*

An assessment is void which includes expenses not authorized.

Folmsbee v. City of Amsterdam, 142 N. Y. 118.

A city is not authorized to impose the expense of paving in front of an open intersecting street upon the owner of the fee of the land in the street intersected.

City of Schenectady v. Trustees Union College, 144 N. Y. 241.

An omission to comply, as to a portion of the work to be done under a contract, with the provisions of the statute requiring competitive bidding is a jurisdictional defect, and the assessment is void as to such portion of the work. *Id.*

VII. RAILROAD AID.

A street railway constructed and owned by a city, after a failure of private enterprise to do so, is for "a city purpose" within the meaning of article 8, section 10 of the Constitution.

Sun Printing & Pub. Ass'n v. Mayor, 152 N. Y. 257.

What extensions of an existing railroad may be made at a sale by order of common council.

Beekman v. Third Ave. R. R. Co., 153 N. Y. 144.

What condition of granting its consent the common council cannot impose. *Id.*

A condition that no passenger shall be charged more than a specified sum for a continuous ride from or to such an extension is a

Municipal Corporations—Continued.

substantial compliance with the provisions of the statute that but one fare shall be exacted. *Id.*

VIII. PARTICULAR CITIES.

Chapter 437, Laws 1896 (the Albany Police Law) is unconstitutional, in that it allows a minority of the common council to appoint, and imposes membership on the two political parties highest in representation in said council as a test of eligibility to the office of police commissioner.

Rathbone v. Wirth, 150 N. Y. 459.

Section 51 of the charter of Albany, providing that claims against the city shall not be maintained until a reasonable time after the presentation of the claim, applies only to claims on contract.

Jones v. City of Albany, 151 N. Y. 223.

In what time an action for personal injuries may be brought against the city. *Id.*

Section 8 of the Civil Service Law of 1883, as amended by chapter 410 of 1889, required the mayors of cities to classify employees.

Chittenden v. Wurster, 153 N. Y. 664.

Policemen appointed by the trustees of the New York and Brooklyn bridge are public officers, and neither side is responsible for the other's acts. *Woodhull v. Mayor*, 150 N. Y. 450.

All the powers in relation to opening new streets conferred upon the common council by the charter of the city of Watertown were transferred to the board of public works by chapter 180, Laws 1891. *Matter of Board of Public Works*, 144 N. Y. 440.

The pay of firemen in Brooklyn is regulated by the charter of 1888. *Stack v. City of Brooklyn*, 150 N. Y. 335.

An amendment by Laws 1887, chapter 262 of section 690, of the New York Consolidation Act, did not take away the power of the board of park commissioners to remove a park policeman at pleasure. *People ex rel. Cline v. Robb*, 126 N. Y. 180.

A person who solicits and fills orders in an adjoining county is not a peddler. *Village of Stamford v. Fisher*, 140 N. Y. 187.

Statutes regulating hawking and peddling should be construed strictly. *Id.*

Chapter 710, Laws 1892, so far modified the provision of the revised charter of the city of Brooklyn as to confer on the fire commissioners the power of fixing the salaries of officers to the fire department subject to the approval of the board of estimate.

People ex rel. Dobson v. Fire Comrs. of Brooklyn, 146 N. Y. 357.

The authorities of the city of New York have power under the charter to permit the construction of cellarways extending into the sidewalk. *Jorgensen v. Squires*, 144 N. Y. 280.

The ordinances prohibiting the construction of a cellar door extending more than five feet into any street, imply permission to construct cellarways within that limit. *Id.*

Municipal Corporations—Continued.

User for twenty years of a cellarway extending about five feet into the street without apparent objection by the city authorities, is evidence from which their consent to its construction may be inferred. *Id.*

Under the charter of Amsterdam requiring the commissioners appointed to ascertain the damages caused by a street improvement to assess the same on the real estate benefitted, any real estate within the city limits benefitted is by that fact alone made liable to assessment.

Matter of Common Council of Amsterdam, 126 N. Y. 158.

Constitutional requirements complied with by the provisions of the act relating to notice to parties assessed and opportunity to be heard. *Id.*

The provision of Laws 1896, chapter 335, section 5, authorizing certain officers of the City of Brooklyn to purchase the property of a water-works company by voluntary purchase or by compulsory proceeding, was limited to two years.

Ziegler v. Chapin, 126 N. Y. 342.

The provisions of the charter of Buffalo (Laws 1870, chap. 519, § 19 as amended by Laws 1885, chap. 181, § 20) prohibiting the city from entering into a contract for a work or improvement at a price exceeding \$500, does not apply to the board of park commissioners.

Bork v. City of Buffalo, 127 N. Y. 64.

The chamberlain of the city of New York is not prohibited by chapter 623 of 1886 from making an agreement with a bank, for the payment by it of interest on deposits.

Mayor, etc., of N. Y., v. Nat. B'dway Bk., 126 N. Y. 665.

It seems, if such an agreement is not within the power of the chamberlain, the bank, having received the benefit of it, is bound thereby and will not be permitted to assert its invalidity. *Id.*

A village, by instituting and prosecuting a proceeding to acquire lands for the purposes of a street, necessarily admits the landowner's right. *Village of Olean v. Steyner*, 135 N. Y. 341.

Where the adjoining premises have been conveyed by reference to a map which recognized a street upon the land sought to be conveyed, the grantees as owners are only entitled in the condemnation proceedings to nominal damages. *Id.*

The city of Schenectady has no power to appropriate or take lands along the natural and permanent banks of a non-navigable stream without giving owner compensation.

City of Schenectady v. Furman, 145 N. Y. 482.

Under the power conferred by its charter to require the removal of obstructions it can only require the owner to clean the stream to its natural bed. *Id.*

The power conferred by the charter of the city of Buffalo to "permit the track of a railroad to be laid in, along, or across any street or public ground," must be construed as subject to

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the qualification that no property rights of abutting owners are thereby invaded.

Reining v. N. Y., Lackawanna, etc., R. R. Co., 128 N. Y. 157.
Though the common council of Buffalo granted permission to a railroad company to occupy a street by erecting an embankment supported by perpendicular stone walls, this did not come within the exercise of its power to change the grade of the street. *Id.*

A resolution of the common council of Utica for improvements is not void because plans were not prepared when it was passed. *Gilmore v. City of Utica*, 131 N. Y. 26.

Where minor details are omitted specifically the action of common council is not void. *Id.*

A direction to publish the requisite legal notice is not a delegation of discretionary power. *Id.*

Where no damage results, an immaterial error may be disregarded. *Id.*

Plans and specifications in the alternative are not invalid. *Id.*

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National Banks ; See Banks.

In order to sustain a recovery by a national bank under United States Revised Statutes (§ 5242), of securities transferred in contemplation of insolvency, there must be satisfactory evidence that the officer making the transfer actually did so in contemplation of insolvency, for the purpose of giving a preference. *Hayes v. Beardsley*, 136 N. Y. 299.

A savings bank has preference in respect to deposits with insolvent national bank.

Elmira Savings Bank v. Davis, 142 N. Y. 590.

Contracts of a national bank may be subject to state legislation without interfering with the national legislation controlling them. *Id.*

National Guard ; See Militia.**Navigable Waters ; See Riparian Owners ; Water-courses.****Navigation ; See Ships and Vessels.****Negligence ; See Agency ; Bailments ; Carriers ; Estoppel ; Evidence ; Insurance ; Highways ; Master and Servant ; Municipal Corporations ; Railroads ; Telegraph.**

I. WHAT CONSTITUTES NEGLIGENCE AND THE LIABILITY THEREFOR.

Negligence—Continued.

II. ACTIONS TO ENFORCE LIABILITY.

III. CONTRIBUTORY NEGLIGENCE.

IV. OF RAILROADS.

I. WHAT CONSTITUTES NEGLIGENCE AND THE LIABILITY THEREFOR.

The sureties for the performance of a municipal contract are not released from claim for damages for personal injuries arising from negligence by the omission of municipality to retain contract money until settlement of all claims.

Mayor v. Brady, 151 N. Y. 611.

A judgment roll in an action in which a judgment had been obtained against a municipal corporation for the personal injury caused by the negligence of contractor entitled municipality to direction of the verdict in an action brought to obtain reimbursement. *Id.*

Facts upon which held the accident was caused by the negligence of intestate's fellow-servants in attempting to remove a safe with the hoisting power on without notifying the engineer to reduce the power, and that defendants were not liable.

Murphy v. Hayes, 145 N. Y. 370.

Master is not liable to servants for misuse by them of proper materials furnished by him. *Kimmer v. Weber*, 151 N. Y. 417.

Non-liability of master for injuries received by servant by breaking of scaffold. *Id.*

A foreman is the co-servant of one injured by breaking of scaffolding; master not liable. *Id.*

Where the injury is attributable to two causes, both proximate, one chargeable to the defendant and the other occurring without the fault of the plaintiff, a recovery is proper.

Phillips v. N. Y. Central, etc., R. R. Co., 127 N. Y. 657.

The negligence of the driver of a vehicle cannot be imputed to a mere passenger. *Id.*

Gas companies are bound to use their pipes in a reasonable manner. *Evans v. Keystone Gas Co.*, 148 N. Y. 112.

What are sufficient facts to justify a finding that the damage to trees was due to the leakage of gas. *Id.*

Evidence as to the condition of other trees in a vicinity may be shown in an action for injury to trees by escaping gas. *Id.*

Section 1932 of the Consolidation Act does not apply to the speed of vehicles of the fire department on their way to fires.

Farley v. Mayor, 152 N. Y. 222.

The driver of a hose-cart does not assume the risks of the insecurity of streets resulting from culpable negligence of the city. *Id.*

When city is chargeable with notice of obstruction in street. *Id.*

Negligence—Continued.

A collision of a ferry-boat against a dock with unusual violence is sufficient to take the question of negligence to the jury.

Snelling v. Brooklyn & N. Y. Ferry Co., affirmed, *it seems*, without opinion in 128 N. Y. 579.

Plaintiff's leaving his seat before the boat was moored is not to be considered of itself contributory negligence. *Id.*

Although a master knew of other defects in a machine he is not chargeable with negligence for defects of which he had no notice.

Schulz v. Rohe, 149 N. Y. 132.

A master is not liable for the neglect of an engineer to make a repair which he has been directed so to do. *Id.*

Failure to provide a proper fire-escape may be predicated upon a finding of the master's negligence in removing steps from beneath it.

Johnson v. Steam Gauge & Lantern Co., 146 N. Y. 152.

In the absence of eye-witnesses to the accident, proof that plaintiff was found lying across a chute is sufficient to warrant a finding that he dropped outside of the platform. *Id.*

A physician who has testified to the nature of the fractures of a leg may give his opinion as to the position of the leg at the time of the accident and the point from which the blow came. *Id.*

Question of negligence properly submitted to jury when issue is whether driver of car did or did not start while plaintiff was alighting from car.

Medler v. Atlantic Ave. R. R. Co., affirmed without opinion, 126 N. Y. 669.

Though city ordinances forbid stopping at a place, yet the duty of using ordinary care to protect passengers arises when stop was not made and injury resulted therefrom. *Id.*

A railroad company which merely permits the public to cross a lot owes no duty of active vigilance.

Walsh v. Fitchburg R. R. Co., 145 N. Y. 301.

Failure to fasten a turntable situate upon its own land is not negligence which will render the company liable for injuries sustained by a child. *Id.*

A banker is responsible for money received for investment without compensation. *Isham v. Post*, 141 N. Y. 100.

Negligence cannot be imputed to failure to make inquiries where no proof is given that such inquiries would be of any value. *Id.*

Where a forger deceives persons after careful examination, a banker is not liable on a forged instrument. *Id.*

Negligence is usually a mixed question of law and fact. *Id.*

It is the duty of the landlord of a tenement-house to use reasonable care to keep a common stairway in repair and suitable condition for the safe passage of his tenants over it in their way to and from their rooms.

Peil v. Reinhart, 127 N. Y. 381.

Negligence—Continued.

Where the uncontradicted evidence shows that the appliance is as good as any known, it is error to submit the question of suitability to the jury.

Frace v. N. Y., Lake Erie, etc., R. R. Co., 143 N. Y. 182.

Where locomotive sparks caused a fire from which a building at a distance was also burned, the burning of the second building must be proved to have been directly caused by the sparks. *Id.*

Where refusal to charge that there is no evidence justifying a finding that the condition of his eyesight was attributable to the injury is erroneous. *Saunby v. City of Rochester*, 145 N. Y. 81.

What is not sufficient to charge the city with constructive notice of obstructions. *Breil v. City of Buffalo*, 144 N. Y. 163.

The mere fact that an electric street car was running at the rate of twelve or fifteen miles an hour in the absence of any law or ordinance does not constitute negligence as a matter of law.

Bittner v. Crosstown Street R. Co., 153 N. Y. 76.

The refusal to charge that a railway company was not liable for the motorman's error of judgment is error. *Id.*

Where defendant leased the land of another he is liable for injury resulting from defective appliance on such land.

Thomas v. Henges, 131 N. Y. 453.

Knowledge of defect is not necessarily knowledge of danger.

Dollard v. Roberts, 130 N. Y. 269.

Where a cargo is delivered, recovery may be had for failure to take proper care with it.

N. Y., Lake Erie, etc., R. R. Co. v. Atlantic Refining Co., 129 N. Y. 597.

Failure of the company to keep a watchman on the side track, and carrying of the lumber on a flat-car instead of a lumber-car, will not constitute contributory negligence. *Id.*

Plaintiff is not bound to act upon the assumption that danger exists. *Id.*

In case of sudden emergency a failure to exercise the best judgment possible cannot be claimed as lack of care or skill.

Wynn v. Central Park, North & East R. R. Co., 133 N. Y. 575.

Where the only evidence is the breaking of a chain, and no proof made that too much force was used on it, there is not sufficient to establish negligence. *Id.*

A person is not liable for injury resulting from a lawful act when lack of care cannot be proved.

Allan v. State Steamship Co., 132 N. Y. 91.

Liability of steamboat company to passenger for loss by theft.

Adams v. New Jersey Steamboat Co., 151 N. Y. 163.

Actions for injuries to property are not within the requirements of the provisions of the charter of the city of Rochester requiring notice of intention to sue.

Werner v. City of Rochester, 149 N. Y. 563.

Negligence—Continued.

Action for injuries caused by catching foot in open step of omnibus. *Frobisher v. Fifth Avenue Transp. Co.*, 151 N. Y. 431.

A physician and surgeon is not liable for mere errors in judgment. *DuBois v. Decker*, 130 N. Y. 325.

It is not sufficient defense to an action of malpractice that a patient did not obey instructions. *Id.*

The fact that the physician was employed by the city, and the patient an inmate of the almshouse, does not relieve the physician. *Id.*

Services gratuitously rendered does not affect his duty to use reasonable care and skill. *Id.*

Error in charging as to degree of care required is ground for reversal.

Schmidt v. Steinway & Hunter's Point Ry. Co., 132 N. Y. 566.

A charge permitting a finding where it is not warranted by the evidence is erroneous.

De Vau v. Penn. & N. Y. Canal, etc., R. R. Co., 130 N. Y. 632.

Persons assuming to maintain a dock for hire are bound to keep it in suitable condition. *Vroman v. Rogers*, 132 N. Y. 167.

Liability of an incorporated village which maintains water-works for failure to keep the system in order,—considered.

Springfield Fire & Marine Ins. Co. v. Village of Keeseville, 148 N. Y. 46.

The provision of the Constitution taking away the limit of recovery in actions for injuries resulting in death is not retroactive.

Isola v. Weber, 147 N. Y. 329.

A recovery cannot be had for injuries resulting from fright.

Mitchell v. Rochester R. Co., 151 N. Y. 107.

Where a car driver could see a considerable distance ahead and car was going six miles an hour, the question of negligence is for the jury.

Schneider v. Second Ave. R. R. Co., 133 N. Y. 583.

An error of judgment in one suddenly placed in peril does not relieve him from the consequences of the negligence which caused such position. *Id.*

Defendant is entitled to have jury charged that no recovery could be had without proof that the frightening of the horse causing the damage was the cause of the accident.

Mitchell v. Turner, 149 N. Y. 39.

While the servants of a street railroad company have the right to remove a trespasser from the car, they have no right to violently assault. *Ansteth v. Buffalo R. Co.*, 145 N. Y. 210.

A child having fallen through an opening negligently left in a state bridge, into the canal below, its father plunged after it and both were drowned; father's death, as well as that of the child, was attributable to the negligence of the state.

Gibney v. State, 137 N. Y. 1.

Negligence—Continued.

Policemen appointed by the trustees of the New York and Brooklyn bridge are public officers and neither city is responsible for the other's acts. *Woodhull v. Mayor*, 150 N. Y. 450.

Neither vessel can recover in common law actions for maritime torts where both are at fault.

New York Harbor Towboat Co. v. N. Y., L. E. & W. R. R. Co., 148 N. Y. 574.

Where an injury results from starting a car prematurely, the question is for the jury.

Akersloot v. Second Ave. R. R. Co., 131 N. Y. 599.

A girl nine and a half years old cannot be held, as a matter of law, to be *non sui juris*.

McGrell v. Buffalo Office Building Co., 153 N. Y. 265.

An owner of a building is not liable for an accident to an elevator which he could not have foreseen. *Id.*

Where rails originally laid level with the surface are later found projecting above, the question is for the jury.

Schild v. Central Park, North & East River R. R. Co., 133 N. Y. 446.

The evidence that no complaint had been made did not affect the liability. *Id.*

Death caused by caving of wall in which, *held*, that the foreman was not negligent in not warning the decedent and that the master was not liable.

Burns v. Matthews, 146 N. Y. 386.

When the facts are equally consistent with the presence or absence of negligence, the question should not be submitted to jury.

Cadwell v. Arnheim, 152 N. Y. 182.

A person driving horses on a highway is not bound to keep them absolutely under control, but to exercise ordinary prudence in the management of them. *Id.*

Where there was not a question for the jury as to the negligence of a driver of horses which ran away. *Id.*

Section 51 of the charter, providing that claims against the city shall not be maintained until a reasonable time after the presentation of the claim, applies only to claims on contract."

Jones v. City of Albany, 151 N. Y. 223.

In what time an action for personal injuries may be brought against the city. *Id.*

The rear platform of a one-horse car, which is narrower than the car and protected by a dashboard 30 inches high, is not necessarily an unsafe place to put a boy 11 years old to drive a horse.

Marks v. Rochester R. Co., 146 N. Y. 181.

In an action against an architect for damages from the fall of an arch alleged to have been due to a defect in the plans, it was incumbent on the owner to prove a substantial compliance with the specifications. *Lake v. McElfatrick*, 139 N. Y. 349.

Negligence—Continued.

Persons using property for business purposes are bound to a reasonable care and prudence.

Flynn v. Central R. R. Co. of N. J., 142 N. Y. 439.

A charge to the effect that one who invites another upon his premises becomes the absolute insurer of such person is erroneous. *Id.*

A county which maintains an insane asylum is engaged in the discharge of a public duty and is not liable for injury to an employee.

Hughes v. County of Monroe, 147 N. Y. 49.

Revenue received from the estates of, or from those legally liable for the support of, lunatics in the asylum, and from the sale of surplus farm products is not to be deemed a source of profit to the county so as to require the operation of the asylum to be treated as a private business. *Id.*

Case where failure to close the doors through which deceased fell overboard and was drowned was negligence of a fellow-servant.

Geoghegan v. Atlas S. S. Co., 146 N. Y. 369.

Whether a gas company was negligent in relying on pipings in a building is a question of fact for the jury.

Schmeer v. Gas Light Co. of Syracuse, 147 N. Y. 529.

While engaged in unloading defendant's ship plaintiff was injured in consequence of the dropping of the wheels of his truck into an opening between the skid and its mouth-piece, *held*, negligent act of plaintiff's fellow-servants.

McCampbell v. Cunard Steamship Co., 144 N. Y. 552.

A gang boss over 40 or 50 men, who is not shown to be charged with any duty as to furnishing materials to them, does not act as the representative of the master in respect thereto.

Keenan v. N. Y., L. E. & W. R. R. Co., 145 N. Y. 190.

A servant who sustains an injury from the negligence of a superior agent engaged in the same general business cannot maintain an action against the master. *Id.*

Plaintiff's horse shied suddenly and precipitated plaintiff down an unguarded embankment; the jury should determine whether the negligence of the highway commissioners, in failing to have a guard or barrier at the place, was the proximate cause of the injury.

Holcomb v. Town of Champion, affirmed on opinion below, 128 N. Y. 599.

Plaintiff was a passenger on one of defendant's street cars when a wagon loaded with lumber passing along the adjoining track in an opposite direction turned suddenly abreast of the car, and the lumber projecting inflicted the injuries complained of, error to submit question of negligence to jury.

Alexander v. Rochester City & Brighton R. R. Co., 128 N. Y. 13.

Negligence—Continued.

What defect in sidewalk a municipal corporation is not chargeable with negligence because of omission to repair.

Beltz v. City of Yonkers, 148 N. Y. 67.

What depression in sidewalk which caused no previous accident is not sufficient to charge municipality with negligence. *Id.*

Case where the injury was caused by the negligence of plaintiff's fellow-servants in failing properly to adjust the hooks of the dump-car.

Soderman v. Kemp, 145 N. Y. 427.

In an action for injuries sustained in descending the stairs at a theater, where there is no proof of any defect except in the condition of the rubber on the sixth step, a refusal to charge that if plaintiff fell from the fourth to the fifth step the verdict must be for the defendants, is error.

Butcher v. Hyde, 152 N. Y. 142.

When a finding that the scorching of boiler took place at some prior time is not justified by the evidence.

Hudson v. R. W. & O. R. R. Co., 145 N. Y. 408.

In an action for negligence in driving a truck, by which child was injured, the question of negligence is one for jury.

Barrett v. Smith, 128 N. Y. 607.

Negligence cannot be charged upon failure to use an appliance other than the one causing the injury.

Babcock v. Fitchburg R. R. Co., 140 N. Y. 308.

Wharfinger is bound only to ordinary care in keeping his wharf.

Caldin v. Parke, 142 N. Y. 564.

The owner of a vessel takes the risk where there is an obstruction in the pathway of general navigation. *Id.*

II. ACTIONS TO ENFORCE LIABILITY.

Negligence of a fellow-workman not employed by same master is cause for action against master of negligent workman.

Johnson v. Netherlands Am. Steam. Nav. Co., 132 N. Y. 576.

Person going on grounds as a mere licensee cannot recover for injuries thereon.

Sterger v. Van Sicklen, 132 N. Y. 499.

A covenant of a landlord to repair does not inure to the benefit of a stranger. *Id.*

Where knowledge of danger exists no cause of action lies.

Shields v. N. Y. Central, etc., R. R. Co., 133 N. Y. 557.

What is sufficient to sustain a recovery against a physician for malpractice.

Link v. Sheldon, 136 N. Y. 1.

In an action for injuries sustained from the falling of a wall during an alteration of the building by a contractor where the injury resulted from careless performance of work in leaving the wall without support, the sole remedy was against the negligent contractor.

Engel v. Eureka Club, 137 N. Y. 100.

Negligence—Continued.

A manufacturer of fireworks is not liable for damages resulting from their negligent use by a purchaser.

Wyllie v. Palmer, 137 N. Y. 248.

When such manufacturer is not liable for the negligent discharge of a rocket by employe acting under the instruction of the committee.

Id.

When the doctrine of *respondeat superior* applies.

Id.

III. CONTRIBUTORY NEGLIGENCE.

Negligence of the driver of a vehicle cannot be imputed to a passenger.

Bennett v. N. Y. Central, etc., R. R. Co., 133 N. Y. 563.

Conduct, otherwise careless, is excusable in imminent danger.

Id.

When the person is confused by the directions of defendant's employes, negligence may be imputed to defendant.

Id.

Getting on a slowly-moving car does not establish contributory negligence as a matter of law.

Morrison v. Broadway & Seventh Ave. R. R. Co., 130 N. Y. 166.

Where the danger is not apparent plaintiff cannot be charged with contributory negligence.

Embler v. Town of Wallkill, 132 N. Y. 222.

Question of contributory negligence in not observing a defect is for the jury.

Vroman v. Rogers, 132 N. Y. 167.

Violation of an ordinance is not sufficient to charge, as a matter of law, contributory negligence.

Fisher v. Village of Cambridge, 133 N. Y. 527.

In the case of a woman injured while alighting from a car while it was slightly moving, the question of contributory negligence was one for the jury.

Reid v. Mayor, etc., of N. Y., affirmed, 139 N. Y. 534.

When person attempting to get upon a train moving past him is responsible for the injury.

Hunter v. Cooperstown & Susquehanna Valley R. R. Co., 126 N. Y. 18.

Though conductor in charge of the train says, "If you are going, jump on," the person complying with the suggestion is not relieved from the consequences of his own negligence.

Id.

To alight from, or to board a train in motion, is a negligent and hazardous act, and is rarely excusable.

Id.

One is guilty of contributory negligence who goes to work on a machine with knowledge of defects and without being directed so to do.

Schulz v. Rohe, 149 N. Y. 132.

A person is not justified in placing himself in a position of danger to rescue cattle from injury.

Morris v. L. S. & M. S. R. Co., 148 N. Y. 182.

Negligence—Continued.

A girl 14 years old, who attempts to run past the rear of a street car, without looking to see if another is approaching on the other track, is guilty of contributory negligence.

Thompson v. Buffalo R. Co., 145 N. Y. 196.

A general exception to the denial of a motion to direct a verdict for the defendant in an action for negligence, where no ground for the motion was stated, is insufficient to raise, upon appeal, the question whether upon evidence the decedent was chargeable with contributory negligence.

Haines v. N. Y. C. & H. R. R. Co., 145 N. Y. 235.

The raising of the gates at a street crossing by a railroad employe does not relieve one from the obligation to use vigilance.

Scaggs v. D. & H. C. Co., 145 N. Y. 201.

A master has a right to use an incomplete structure, and if the servant, with knowledge of the fact, consents to work at that place, he assumes the risk.

Kennedy v. Manhattan R. Co., 145 N. Y. 288.

Where it clearly appears that the servant had knowledge of the condition of the place where he was at work, a submission of that question to the jury is error. *Id.*

Where an employe is injured by a train of another railroad while working on his own road, the question of contributory negligence is for the jury.

Noonan v. N. Y. Central, etc., R. R. Co., 131 N. Y. 594.

In such case the employe is not bound by the rule requiring an outlook in both directions. *Id.*

He had a right to rely on a rule of his own road which required a brakeman to be upon the end of the approaching train. *Id.*

Where the train is in charge of employes of another road the deceased could not be considered a fellow-servant. *Id.*

Traveler on street assumes a risk of attempting to pass over a displaced flagstone; gas company which removed the stone not liable. *Whalen v. Citizens' Gas Light Co.*, 151 N. Y. 70.

It is not negligence in matter of law for passenger to get on moving train when directed so to do by conductor.

Distler v. Long Island R. R. Co., 151 N. Y. 424.

Circumstances under which, held, that act of getting on moving train cannot be said to contribute to injury. *Id.*

It is not necessarily contributory negligence to take a lighted candle to endeavor to discover a leak in a gas pipe.

Schmeer v. Gas Light Co. of Syracuse, 147 N. Y. 529.

Failure of one vessel which has signaled and has not received answer, to slacken speed, constitutes contributory negligence as matter of law.

New York Harbor Towboat Co. v. N. Y., L. E. & W. R. R. Co., 148 N. Y. 574.

Although passenger knows that an overcrowded platform is

Negligence—Continued.

dangerous, getting on such platform does not make him guilty of contributory negligence.

Graham v. Manhattan R. Co., 149 N. Y. 336.

Although Factory Act requires cog wheels to be covered, yet servant may properly be held to assume the risks thereof.

Knisley v. Pratt, 148 N. Y. 372.

What knowledge makes party who skates on new ice guilty of contributory negligence.

Sickles v. New Jersey Ice Co., 153 N. Y. 83.

The rule that a traveler on a street may rely on the assumption that the municipality has performed its duty in keeping it safe does not apply to a skater on a river as against one having a right to cut ice thereon.

Id.

It is not contributory negligence *per se* for a passenger to attempt to alight from a slowly moving train at the request of the conductor.

Lewis v. D. & H. C. Co., 145 N. Y. 508.

Though plaintiff's intestate, while passing from the smoking-car to the car in the rear was thrown from the platform and killed, by the breaking of the coupling, the deceased was not guilty of contributory negligence.

Costikyan v. Rome, Watertown, etc., R. R. Co., affirmed without opinion, 128 N. Y. 633.

The rule that it is not negligence *per se* for a passenger to stand on the platform while the train is in motion.

Id.

It seems that the true meaning of Laws 1850, chapter 120, section 46, exempting railroads from liability for injuries received by passengers while on the platform of a car is that the passenger shall not stand or remain on the platform while the cars are in motion, when there is sufficient accommodation inside the car.

Id.

A tenant in a tenement-house in passing over a stairway, the carpet of which is in defective condition, with knowledge of such defect, is not chargeable with contributory negligence which will defeat an action for injuries sustained in tripping at a hole in such carpet.

Peil v. Reinhardt, 127 N. Y. 381.

It seems that the rule would be different if the defect had been in the portion of the premises demised to the tenant.

Id.

It is plaintiff's duty to see that no obstacle is outside the car which makes it dangerous for him to get upon it.

Moylan v. Second Ave. R. R. Co., 128 N. Y. 583.

It is not contributory negligence for person to be on sidewalk where she was struck in front of defendant's depot.

O'Toole v. Central Park, North & East River R. R. Co., affirmed, *it seems*, without opinion, 128 N. Y. 597.

It is contributory negligence to unnecessarily encounter danger.

Finnell v. Delaware, Lackawanna, etc., R. R. Co., 129 N. Y. 669.

Negligence—Continued.

Compliance of seaman with an order to operate an unsafe machine is not such negligence as will, as matter of law, prevent his recovery. *Eldridge v. Atlas Steamship Co.*, 134 N. Y. 187.

An action for negligence should not be submitted to a jury where plaintiff's evidence is equally as consistent with the absence as the existence of negligence on the part of the defendant.

Powers v. N. Y. Central, etc., R. R. Co., affirmed without opinion in 128 N. Y. 659.

This rule applied in an action against a railroad company brought by a fireman in its employ who was injured in consequence of the breaking of a pin-coupling. *Id.*

Failure to use care and caution where knowledge of danger exists is contributory negligence.

Scott v. Penn. Ry. Co., 130 N. Y. 679.

A servant cannot recover for an injury resulting from his own neglect.

La Croy v. N. Y., Lake Erie, etc., R. R. Co., 132 N. Y. 570.

Mistake in interpreting signal does not establish contributory negligence.

Richardson v. N. Y. Central, etc., R. R. Co., 133 N. Y. 563.

Where brakeman knew of the existence of the bridge by which he was killed, he was not, as a matter of law, chargeable with contributory negligence, because in active discharge of duty which distracted his attention.

Wallace v. Central Vermont R. R. Co., 138 N. Y. 302.

In an action against a city for personal injuries, the proof showed that plaintiff stepped upon a ridge of ice formed by the discharge of water from a conductor upon the sidewalk and fell; an inch of snow had fallen the night before; failure to prove absence of contributory negligence is fatal.

Weston v. City of Troy, 139 N. Y. 281.

Contributory negligence may be established by circumstantial proof. *Chisholm v. State of New York*, 141 N. Y. 246.

Where a child five years old was killed by a street car while with other children in the street, *held*, that the negligence of defendant being established, it was not negligence on the part of the child's parents as a matter of law to permit it to be in the street.

Huerzeler v. Central Cross-Town R. R. Co., 139 N. Y. 490.

Negligence of the child, being *non sui juris*, would not avail defendant. *Id.*

IV. OF RAILROADS.

When a railroad company permitting cars to be switched and kicked upon tracks running into repair shop is liable for failure to furnish a safe place for working-men employed in the shop.

Doing v. N. Y., O. & W. R. R. Co., 151 N. Y. 579.

Negligence—Continued.

The duty of a railroad company is to change the manner of operation where it is known that its employes are doing work in a reckless manner. *Id.*

Although freight train is only equipped with hand-brakes, such evidence alone does not charge the company with negligence.

Wooden v. Western New York & Pennsylvania R. R. Co., 147 N. Y. 508.

What testimony is insufficient to authorize inference that the condition of the road-bed was such as to cause a wreck. *Id.*

Brakeman assumes the risk which the conductor takes in carelessly taking a train to a certain point which posted rules of the company leave to his discretion. *Id.*

The duty of railroad company to shipper on whose private track the switch engine is sent to remove cars; notice that engine is coming to shipper is sufficient.

McInerney v. Prest., etc., D. & H. C. Co., 151 N. Y. 411.

The failure to use of discretion in an emergency will not support an allegation of negligence.

Connelly v. Manhattan Ry. Co., 142 N. Y. 377.

The conduct of a person in attempting to cross a railroad track must be judged by the surrounding circumstances.

McNamara v. N. Y. Central, etc., R. R. Co., 136 N. Y. 650.

When the questions of negligence and of contributory negligence were properly submitted to the jury in action for injuries at crossing.

Doyle v. Penn. & N. Y. Canal & R. R. Co., 139 N. Y. 637.

Case where death of intestate at a railroad crossing, where the train was running at a high rate of speed, and there was evidence that the statutory signals were not given, sustained.

Cook v. N. Y. Central, etc., R. R. Co., affirmed without opinion, 128 N. Y. 635.

A mere surmise that there may have been negligence is not sufficient to submit question of negligence to jury.

Morris v. L. S. & M. R. S. Co., 148 N. Y. 182.

Evidence to sustain a finding of negligence on the part of a railroad company in permitting the opening of a gate at a crossing by a passerby reviewed sustaining recovery.

Haywood v. N. Y. Central, etc., R. R. Co., affirmed without opinion, 128 N. Y. 596.

Allowing a gate to be opened, and to remain open long enough for a traveler to pass through, is sufficient to justify submission of the question of negligence to a jury *Id.*

The burden of proving that decedent was free from contributory negligence in not regarding closed gate, and that a train was approaching, was upon the plaintiff seeking to charge the railroad company. *Id.*

Negligence—Continued.

Where absence of a flagman is a material inquiry in an action against a railroad for death caused by negligence, testimony as to statements of bystanders to the effect that the flagman did not attend to his business is hearsay and inadmissible.

Felska v. N. Y. C. & H. R. R. R. Co., 152 N. Y. 339.

Proof that platforms were crowded and that, in confusion, plaintiff was injured by a quarrel of the gateman with passenger, tends to show negligence on the part of the railroad company.

Graham v. Manhattan R. Co., 149 N. Y. 336.

The falling of an iron bar from an elevated railroad raises the presumption of negligence.

Hogan v. Manhattan R. Co., 149 N. Y. 23.

Submission of the question of defendant's negligence in location of crane, held erroneous under facts proven.

Sisco v. Lehigh & Hudson River R. Co., 145 N. Y. 296.

Where a railroad company has promulgated proper rules for its servants, and knows of no violation thereof, it is not chargeable with negligence in failing to detect an habitual violation of duty in a servant.

Cameron v. N. Y. C. & H. R. R. R. Co., 145 N. Y. 400.

Section 46 of the General Railroad Act of 1850, exempting the railroad company from liability for injuries to a passenger while riding on the platform, does not apply to a street railroad.

Vail v. Broadway R. R. Co., 147 N. Y. 377.

Where a crossing is guarded by gates the same vigilance is not required as where he approaches one not so guarded.

Kane v. N. Y., New Haven, etc., R. R. Co., 132 N. Y. 160.

Where the gates are closed while passing between them the question of contributory negligence is for the jury. *Id.*

Where the care of the gates is relied upon to prove negligence, evidence as to bell or whistle is immaterial. *Id.*

Case where no negligence on the part of the railroad was shown, and that a nonsuit was proper for injuries to party caused by horse frightened by escaping steam from an engine.

Scaggs v. D. & H. C. Co., 145 N. Y. 201.

Question whether defendant had actual notice of defects in an abutment, not visible or capable of detection from the outside, one for the jury to determine.

Bogart v. D. L. & W. R. R. Co., 145 N. Y. 283.

A railroad company is required to exercise a supervision over its servants and the prosecution of its business as its rules require.

Whittaker v. Delaware & Hudson Canal Co., 126 N. Y. 544.

Its duty is to exercise such an oversight and supervision of such servants that if they afterwards become habitually or notoriously incompetent or unfit, etc., to perform their duties, this incompetency should be guarded against. *Id.*

Negligence—Continued.

Negligence is not to be imputed to a railway company when an accident occurs.

Goldberg v. N. Y. Central, etc., R. R. Co., 133 N. Y. 561.

A rule forbidding trains to approach a station when a train was discharging passengers had no application, as the train plaintiff left was moving from the station. *Id.*

The duty of a railroad company is performed by using such appliances as have been tested and used.

Flinn v. N. Y. Central, etc., R. R. Co., 142 N. Y. 11.

Where no particular contrivance is proved defective, a cause of action is not made out by showing that a new appliance was not used. *Id.*

A railroad company is not bound at once to use new appliances. *Id.*

Proof not connected with the injury complained of is insufficient. *Id.*

The repeal by Laws 1886, chapter 593, of the provisions of the General Railroad Act imposing upon the corporation the duty of ringing a bell or blowing a whistle upon approaching a highway crossing, left as the only provision upon the subject that of Penal Code (§ 421); omission by the company be regarded as negligence.

Vandewater v. N. Y. & New England R. R. Co., 135 N. Y. 583.

Failure to give due warning by whistle or bell or otherwise would be a failure to manage their trains with proper care for which they would be liable. *Id.*

Negotiable Instruments ; *See Bills and Notes ; Bonds ; Carrier ; Municipal Corporations ; Purchaser for Value.*

New Trial ; *See Appeal ; Error.*

Where the questions decided by the court dispose of the entire controversy, it is proper for the court, on setting aside a verdict upon a single question submitted to the jury, to refuse a new trial unless its decision on the other question is reversed on appeal. *De Forest v. Walters*, 153 N. Y. 229.

A motion for a new trial on the ground that a verdict for nominal damages was improper is addressed to the discretion of the court. *Jung v. Keuffel*, 144 N. Y. 380.

Pendency of an appeal is not a bar to a motion for a new trial. *Henry v. Allen*, 147 N. Y. 346.

An order denying a motion for a new trial on the ground of newly-discovered evidence is not appealable to the Court of Appeals. *White v. Benjamin*, 150 N. Y. 258.

A statement by witness to jury viewing premises in the absence of defendant is ground for a new trial. *People v. Gallo*, 149 N. Y. 106.

New Trial—Continued.

New trial should be granted when witness for plaintiff in cross-examination made serious charge against character of defendant and plaintiff's counsel would not allow explanation or correction by witness.

Chesebrough v. Conover, appeal dismissed, 126 N. Y. 678.

Motion for new trial when properly denied in action for conversion on ground that a subsequent admission of assignor was contrary to deposition used in trial.

Heald v. Van Siclen, affirmed without opinion in 128 N. Y. 612.

Court will not interfere with verdict of a jury when supported by sufficient evidence unless injustice has been done.

People v. Tice, 131 N. Y. 651.

Where plaintiff recovered judgment on both trials of an action, the first judgment, being reversed on appeal, defendant is entitled to a new trial.

London v. Townshend, 133 N. Y. 674.

Where the referee disregarded the decision of Court of Appeals on former judgment, a new trial should be ordered.

Moore v. Simmons, 133 N. Y. 695.

New York City ; See *Municipal Corporation*.

I. CHARTER.

II. POWERS.

III. LIABILITIES.

IV. IMPROVEMENTS AND SPECIAL ASSESSMENTS.

V. OFFICERS, AGENTS AND DEPARTMENTS.

I. CHARTER.

The Rapid Transit Acts do not contravene the provisions of article 8, section 10, or article 3, section 18 of the Constitution, and are valid.

Sun Printing & Pub. Ass'n v. Mayor, 152 N. Y. 257.

A street railway constructed and owned by a city, after a failure of private enterprise to do so, is for "a city purpose" within the meaning of article 8, section 10 of the Constitution. *Id.*

Chapter 601, Laws 1895, abolishing the office of police justice in New York city, is not violative of section 22 of article 6 of the Constitution.

Koch v. Mayor, 152 N. Y. 72.

Section 798 of the Consolidation Act,—construed.

Flandreau v. Ellsworth, 151 N. Y. 473.

Provisions of section 903 of the Consolidation Act,—construed.

Poth v. Mayor, 151 N. Y. 16.

Section 1932 of the Consolidation Act does not apply to the speed of vehicles of the fire department on their way to fires.

Farley v. Mayor, 152 N. Y. 222.

The driver of a hose-cart does not assume the risks of the inse-

New York City—Continued.

curity of streets resulting from culpable negligence of the city. *Id.*

II. POWERS.

Power of park commissioners of New York under section 688 of the Consolidation Act to grant a permit to erect bay windows.

Wormser v. Brown, 149 N. Y. 163.

The authorities of the city of New York have power under the charter to permit the construction of cellarways extending into the sidewalk.

Jorgensen v. Squires, 144 N. Y. 280.

The ordinances prohibiting the construction of a cellar door extending more than five feet into any street, imply permission to construct cellarways within that limit. *Id.*

User for twenty years of a cellarway extending about five feet into the street, without apparent objection, is evidence from which consent of city authorities to its construction may be inferred. *Id.*

III. LIABILITIES.

The city and county of New York is not exempted from paying its quota of the state taxes imposed by chapters 214 and 565 of 1893 for care of the insane. *People v. Fitch*, 148 N. Y. 71.

IV. IMPROVEMENTS AND SPECIAL ASSESSMENTS.

Under section 2120, subdivision 2 of the Code, an award made by commissioners appointed to estimate loss by reason of change of grades of streets may be reviewed by *certiorari*.

Matter of Fitch, 147 N. Y. 334.

Payment of an assessment which is void for want of jurisdiction, made in ignorance of the defects, is not voluntary, and may be recovered. *Mutual Life Ins. Co. v. Mayor*, 144 N. Y. 494.

An omission to comply, as to a portion of the work to be done under a contract, with the provisions of the statute requiring competitive bidding, is a jurisdictional defect. *Id.*

An action to prevent the creation of a cloud upon title by the sale and giving of a lease upon such sale for non-payment of an assessment upon lands in the city of New York which is alleged to be void cannot be maintained.

Scudder v. Mayor, 146 N. Y. 245.

Construction of approaches to bridges over Fourth Avenue, at Forty-eighth Street, in pursuance of chapter 702 of 1872, constitutes a change of grade; abutting owners have no right of action against railroad to compel removal.

Talbot v. N. Y. & H. R. R. Co., 151 N. Y. 155.

V. OFFICERS, AGENTS AND DEPARTMENTS.

A lease of "wharfage which may arise, accrue or become due for

New York City—Continued.

the use and occupation, in the manner and at the rates prescribed by law," of a public wharf, "together with the right to enter and collect said wharfage," is not a lease of the wharf itself, which remains public property to which vessels may be assigned by the harbor authorities.

Eastman v. Mayor, 152 N. Y. 468.

Case where the rights of the parties to a lease of a ferry franchise, made prior to 1870, *held* not affected by the charter of 1870, to renew the lease at the same rental.

New York & Brooklyn Ferry Co. v. Mayor, 146 N. Y. 145.

Where a ferry franchise is granted to a new corporation which was organized by the officers of the former lessee for its benefit, the lease is, in effect, issued to the former lessee, and it has no cause of action under a covenant of its lease for reimbursement for the value of buildings and fixtures. *Id.*

Section 663 of the Consolidation Act, as amended by chapter 84, Laws 1887, requiring tenement-houses to be furnished by the owners with water on each floor when the board of health so directs, does not deprive the owner of his property without due process of law.

Health Department v. Rector, etc., of Trinity Church, 145 N. Y. 32.

Such section authorizes the board to require the owner to furnish appliances for the distribution of the water and includes a sufficient supply of water for domestic use. *Id.*

One place of supply on each floor, if fairly accessible to all the occupants of that floor, is all that can be required. *Id.*

What objection will not be considered in proceedings for *mandamus* to compel a comptroller of New York city to pay an award made by commissioners.

People ex rel. Purdy v. Fitch, 147 N. Y. 355.

A certificate of reappointment of commissioners under chapter 537 of 1893 is regular. *Id.*

The reappointment of the commissioners was unnecessary under the amendment of 1894. *Id.*

The reasonableness of a determination of the commissioners of the fire department of New York city may be contested in an action for a penalty for disobedience of such order.

Fire Dept. of New York v. Gilmour, 149 N. Y. 453.

New York and Long Island Bridge.

This corporation has power under its charter as amended to and including chapter 212 of 1894 to take lands for its purposes.

N. Y. & L. I. Bridge Co. v. Smith, 148 N. Y. 540.

What amendment to the charter was unconstitutional and void. *Id.*
Section 30 of the Rapid Transit Act does not apply to the company. *Id.*

New York and Long Island Bridge—Continued.

Chapter 225, Laws 1893, authorizing certain bridge companies to lay tracks and operate a railroad upon their bridges, does not apply to such company. *Id.*

New York Produce Exchange ; *See Brokers.*

New York Stock Exchange ; *See Brokers.*

Next of Kin ; *See Descent ; Distribution.*

Non-Resident ; *See Divorce ; Practice.*

Nonsuit ; *See Error.*

Notary Public.

A notary public is a public officer within the meaning of section 5 of article 13 of the Revised Constitution.

People v. Rathbone, 145 N. Y. 434.

Such prohibition applies to the use of a pass which the officer received before such provision went into effect. *Id.*

Notice ; *See Purchaser for Value ; Recording Conveyances.*

Possession is notice of occupant's rights in regard to property.

Holland v. Brown, 140 N. Y. 344.

A personal notice is necessary unless the context or the circumstances of the case may be such as to show that the personal notice was not intended, and in such a case a notice by mail which is the ordinary mode of giving notices in business transactions.

Beakes v. De Cunha, 126 N. Y. 293.

It seems that in proceedings upon a reference of a claim against a decedent a notice of pendency of action may be filed.

Matter of Bingham, 127 N. Y. 296.

What is as a matter of law sufficient proof of notice of forfeiture of policy. *Hastings v. Brooklyn Life Ins. Co.*, 138 N. Y. 473.

The doctrine of *lis pendens* does not apply to an action to recover damages for a trespass. *Hailey v. Ano*, 136 N. Y. 569.

It seems that such action is not one in which a notice of pendency may be filed under the provisions of the Code. *Id.*

Where statute requires notice to be given it means notice in writing. *Erving v. Mayor, etc., of New York*, 131 N. Y. 133.

Notice to agent is notice to owner.

Hall v. Germain, 131 N. Y. 536.

A check drawn as agent puts the payee on inquiry as to agent's authority. *Gerard v. McCormack*, 130 N. Y. 261.

Notice of Pendency of Action.

When a *lis pendens* filed in an action for specific performance of

Notice of Pendency of Action—Continued.

an agreement to sell land is no notice to one who takes a mortgage on such premises pending the action.

Oliphant v. Burns, 146 N. Y. 218.

The filing of a *lis pendens* in an action to restrain the violation of restrictive covenants of an agreement concerning the use of land gives no priority to a judgment for costs in such action.

Crocker v. Lewis, 144 N. Y. 140.

Novation.

The principle of novation does not apply where a new firm has not assumed liability to a creditor beyond the indebtedness appearing on the books of the old firm.

Corner v. Mackay, 147 N. Y. 574.

Nuisance ; See Constitutional Law.

A railroad cannot, by virtue of sections 24 and 28 of the General Railroad Act of 1850, obstruct a street though it substitutes another.

Buchholz v. N. Y., L. E. & W. R. R. Co., 148 N. Y. 640.

Injury to business by reason of obstruction of highway ground for injunction to restrain nuisance. *Id.*

In order to relieve a corporation in performing a public duty from liability for maintaining a nuisance express authority for performance of the act must be shown.

Morton v. Mayor, etc., of New York, 140 N. Y. 207.

Authority to perform an act does not permit such performance as will injure others. *Id.*

The reasonableness of the use to which land is put is the test of its permissible use.

Booth v. Rome, Watertown, etc., R. R. Co., 140 N. Y. 267.

A person has a right to adopt and use any lawful means in the improvement of his property. *Id.*

No lapse of time or mere inaction on the part of the owner of real estate during the erection and maintenance of a nuisance or unlawful structure injurious to his rights, is sufficient to defeat his right to damages.

Galway v. Metropolitan Elevated Ry. Co., 128 N. Y. 132.

An indictment for carrying on the business of fat rendering within the limits of a city, under Laws 1892, chapter 646, must allege that it was carried on as a public nuisance.

People v. Rosenberg, 138 N. Y. 410.

Whether the legislature under the police power can absolutely prohibit the carrying on of a specified business, not claimed to injuriously affect the community,—query. *Id.*

The authorities of the city of New York have power under the

Nuisance—*Continued*.

- charter to permit the construction of cellarways extending into the sidewalk. *Jorgensen v. Squires*, 144 N. Y. 280.
- The ordinance prohibiting the construction of a cellar door extending more than five feet into any street, implies permission to construct cellarways within that limit. *Id.*
- Use for 20 years of a cellarway extending about five feet into the street, without objection, is evidence from which consent of city authorities to its construction may be inferred. *Id.*
- A defect is not a nuisance as to a mere licensee. *Sterger v. Van Sicklen*, 132 N. Y. 499.
- In order to recover, the defect must be a nuisance to the party complaining. *Id.*
- A private action can only be maintained by one whose legal interest is affected. *Kavanagh v. Barber*, 131 N. Y. 211.
- Action can be maintained only by the owner of the premises affected. *Id.*
- Where the property is owned by the wife, she may sue for special damages. *Id.*

O.

Oath ; *See Affidavits ; Practice.*

Offer of Judgment ; *See Judgment.*

Office ; *See Bond ; Constitutional Law ; Municipal Corporation ; New York City.*

- I. PROCEEDINGS TO DETERMINE TITLE.
- II. APPOINTMENT AND REMOVAL.
- III. TENURE.
- IV. QUALIFICATION AND BONDS.
- V. POWERS OF OFFICER.
- VI. LIABILITY.
- VII. COMPENSATION.

I. PROCEEDINGS TO DETERMINE TITLE.

- Upon establishing his election and the fact that he has duly qualified, a supervisor is entitled to the funds and papers held by his predecessor. *Matter of Bradley*, 141 N. Y. 527.
- The person whose term has expired cannot question the validity of his successor's election except by direct proceedings. *Id.*
- Where *mandamus* will not lie to determine the validity of a claim to an office. *People ex rel. Lewis v. Brush*, 146 N. Y. 60.

Office—Continued.

Mandamus will lie to compel the recognition of a person receiving a majority of votes for the office.

Goring v. Prest., etc., of Wappingers Falls, 144 N. Y. 616.

II. APPOINTMENT AND REMOVAL.

The general rule is that where the power of appointment is conferred in general terms, the power of removal at the will of the appointing power is implied.

People ex rel. Cline v. Robb, 126 N. Y. 180.

Power of appointment of subordinates is still vested in the superintendent of public works subject to section 9, article 5 of the Constitution, requiring appointment to be made by a competitive examination.

People ex rel. McClelland v. Roberts, 148 N. Y. 360.

An, honorably discharged union soldier may be discharged for incompetency.

People ex rel. Fonda v. Motton, 148 N. Y. 156.

The Veteran Acts do not prevent a city from abolishing an office, if it acts in good faith.

People ex rel. Corrigan v. Mayor, 149 N. Y. 215.

When *mandamus* will not lie to compel reinstatement in office.

Id.

The warden of a city prison in New York is a city or county officer within the meaning of the Veteran Act of 1892, and his removal cannot be effected without a hearing.

People ex rel. Fallon v. Wright, 150 N. Y. 444.

The clerk of the police justice of the city of Syracuse is a member of the civil service of that city, and his position is not a confidential one.

People ex rel. Sears v. Toby, 153 N. Y. 381.

The judgment in a *quo warranto* proceeding to try the title of the respondent to an officer cannot provide for the inducting of the relator into such office; *mandamus* is the proper remedy. *Id.*

What return to a *certiorari* to review an alleged improper dismissal of a fireman, the court cannot go beyond.

People ex rel. Miller v. Wurster, 149 N. Y. 549.

There can be no officer *de facto* when there is no office to fill.

Matter of Quinn, 152 N. Y. 89.

The act of an officer whose office has been abolished cannot be sustained as that of a *de facto* officer, where it is not shown that there was any open or notorious exercise by him of the duties of the office or any apparent possession of it or any reputation of continuing to fill it.

Id.

What constitutes a practical discharge under the Civil Service Law.

McNamara v. Mayor, 152 N. Y. 228.

How voter may vote if the name of an office required to be filled at an election is omitted from the official ballot.

Goring v. Prest., etc., of Wappingers Falls, 144 N. Y. 616.

Office—Continued.

The position of assistant warrant clerk in the office of the Comptroller of Brooklyn is a confidential position; the incumbent may be discharged without cause.

People ex rel. Crummev v. Palmer, 152 N. Y. 345.

III. TENURE.

Where no definite term is attached to an office, the power of appointment implies power of removal.

People ex rel. Griffin v. Lathrop, 142 N. Y. 113.

A statute enlarging the terms of town officers applies only to those elected after its enactment.

People ex rel. Lovett v. Randall, 151 N. Y. 497.

When chapter 344 of 1893, extending term of commissioners of highways, became operative. *Id.*

By force of the Public Officers Law, where a town commissioner of highways is lawfully holding over, the office is deemed vacant for the purpose of electing a successor from date of expiration of term for which incumbent was chosen. *Id.*

Chapter 344 of 1893, extending the term of office of town clerks, does not apply to a town clerk who is elected prior to its passage. *People ex rel. Le Roy v. Foley*, 148 N. Y. 677.

The election of a public officer must be referred to the day upon which the electoral body expresses its choice by voting, and there is no distinction between town and other elections. *Id.*

The legislature cannot extend the term of a town officer after he is elected. *Id.*

IV. QUALIFICATION AND BONDS.

Additional legislation is not required to put civil service section of Constitution in force, as the General Civil Service Law applies and covers the case.

People ex rel. McClelland v. Roberts, 148 N. Y. 360.

The doctrine sustaining the acts of *de facto* officers does not apply where the official's actions are challenged at the beginning.

Williams v. Boynton, 147 N. Y. 426.

What is necessary to constitute a person a *de facto* officer, considered. *Id.*

Failure of police officials to take an oath that they are not interested in the manufacture or sale of liquors, only furnishes a cause for forfeiture.

People ex rel. Willson v. Trustees of Mount Vernon, affirmed, *it seems*, without opinion, 128 N. Y. 657.

The act (chap. 163 of 1890) applies only to excise commissioners, excise inspectors, police officials and their subordinates. *Id.*

V. POWERS OF OFFICE.

Where officers have power to hear and determine, they are bound to make a determination. *People v. Meakim*, 133 N. Y. 214.

Office—*Continued.*

This rule applied to excise commissioners. *Id.*

Removal of a public officer as result of a civil proceeding is not a punishment for a crime. *Id.*

Nor is the imposition of a fine for disobeying a writ of *mandamus*. *Id.*

VI. LIABILITY.

A tax warrant issued by the state comptroller under an unconstitutional act is no protection to the officer executing it.

United Lines Telegraph Co. v. Grant, 137 N. Y. 7.

A public officer who omits to perform a ministerial duty may be enjoined and is liable in damages to the party injured.

Wright v. Shanahan, 149 N. Y. 495.

Payment to a *de facto* officer while holding the office is defense to an action by the *de jure* officer to recover the salary.

Demarest v. Mayor, 147 N. Y. 203.

Where the office had previously existed, the fact that persons actually assume it renders them *de facto* officers. *Id.*

VII. COMPENSATION.

Plaintiff was appointed an inspector of masonry on the new aqueduct for the city of New York under Laws 1883, chapter 490. *Held*, that an agreement not to receive pay during suspension was waiver, though he could be discharged and not suspended. He was entitled to pay during suspension before date of his agreement.

Emmitt v. Mayor, etc., of New York, 128 N. Y. 117.

It is only when the salary of an official is fixed by law that it is beyond the power of those by whom he has been employed to agree upon some other sum or to affect it in any way. *Id.*

Offset ; *See Counter-Claim.*

Oleomargarine ; *See Constitutional Law.*

Orders ; *See Assignment ; Practice.*

Oyer and Terminer ; *See Criminal Law.*

Oysters ; *See Fisheries.*

Chapter 383, Laws 1896, authorizing the seizure of any vessel used in disturbing oysters, is unconstitutional.

Colon v. Lisk, 153 N. Y. 188.

Right of a tenant in common of oyster-bed to remove oysters.

Mott v. Underwood, 148 N. Y. 463.

Oysters—Continued.

All essential ingredients must be stated in an indictment.

People v. Loundes, 130 N. Y. 455.

Planting as well as gathering oysters for a non-resident employer or for one's self is a misdemeanor. *Id.*

The legislature may discriminate as to who are citizens of the state. *Id.*

P.

Parent and Child ; *See Guardian ; Infants ; Master and Servant ; Seduction.*

There is no rule of law which compels an inference from the fact of relationship of parent and child against the existence of the agreement by the parent to compensate the child for the services, and it is error so to charge jury.

Ulrich v. Ulrich, 139 N. Y. 120.

A father may emancipate his minor child by parol, and thereafter may contract with him. *Kain v. Larkin*, 131 N. Y. 300.

Charge of court as to disposition of earnings of son over 21, held, erroneous. *Keenan v. Brooklyn City R. R. Co.*, 145 N. Y. 348.

Parent cannot accept sum for injuries to child who was a minor, and such proceeding is not bar to an action.

Palmer v. Conant, affirmed without opinion, 128 N. Y. 577.

Parties ; *See Creditor's Suit ; Equity ; Foreclosure ; Pleading.*

Partition ; *See Judicial Sales.*

When a tenant in common cannot be allowed in partition for improvements made by him. *Cosgriff v. Foss*, 152 N. Y. 104.

When a complaint in an action for partition brought by an heir-at-law of testator under section 1537 of the Code cannot be amended. *Ellerson v. Westcott*, 148 N. Y. 149.

Motion costs only are allowable in proceedings for distribution of moneys in the hands of a referee in partition.

Fowler v. Fowler, 147 N. Y. 673.

After-born children who might have an interest in the real estate sold in partition would be concluded by the judgment of sale and could not successfully assail the title of a purchaser.

Kirk v. Kirk, 137 N. Y. 510.

An interlocutory judgment decreeing the sale of the interest of a tenant by the curtesy may be amended after the death of such tenant before sale. *Mingay v. Lackey*, 142 N. Y. 449.

Where the parties do not show title or possession, judgment in partition does not establish title as against third parties.

Greenleaf v. Brooklyn, Flatbush, etc., R. R. Co., 141 N. Y. 395.

Partition—Continued.

The sanction of the court directing payment of share in partition should be obtained. *Lythgoe v. Smith*, 140 N. Y. 442.

A new trial cannot be had where the questions framed were answered by the jury and the case held at Special Term.

Bowen v. Sweeney, 143 N. Y. 349.

Purchaser will not be compelled to take title in partition where judgment is voidable at election of infants.

Crouter v. Crouter, 133 N. Y. 55.

An action of partition does not lie to remainderman where a testator has converted his real estate into personalty and vested the legal estate in trustees during the lifetime of his widow.

Underwood v. Curtis, 127 N. Y. 523.

A party cannot complain of an order setting aside a judgment in an action for partition although it deprives him of his adjudication as to his legitimacy.

Furman v. Furman, 153 N. Y. 309.

Partnership; See Accounting; Agency; Husband and Wife; Joint Stock Companies.

I. NATURE AND REQUISITES.

II. POWER OF PARTNERS.

III. RIGHTS AND LIABILITIES.

IV. RIGHTS OF CREDITORS.

V. FIRM PROPERTY.

VI. DISSOLUTION.

VII. LIMITED PARTNERSHIP.

I. NATURE AND REQUISITES.

The interest of a partner in the firm property is personal property, and title passes upon execution of agreement of sale.

Van Brocklen v. Smeallie, 140 N. Y. 70.

Unless otherwise agreed upon each partner has an equal right to the possession of assets in dissolution.

Gray v. Greene, 142 N. Y. 316.

Where an agreement is for equal division of profits but no assumption of liability, the relation does not exist.

Demarest v. Koch, 129 N. Y. 218.

A partner is bound to reimburse the firm the cost of securing the performance of his duties during his illness.

Hart v. Myers, affirmed without opinion, 128 N. Y. 578.

When services are not of a personal character, such that one alone could perform them, illness afforded no excuse for the non-performance.

Id.

Under a provision in the will of a deceased partner authorizing his executors to conduct his interest in the business of the firm,

Partnership—Continued.

in conjunction with his co-partner, in such manner as they shall deem proper, and for such time as they shall deem for the interest of his estate, only that portion of the testator's estate invested in the firm's business is subjected to its hazard.

Columbus Watch Co. v. Hodenpyl, 135 N. Y. 430.

A creditor dealing with such new partnership has the right to issue an execution upon a judgment recovered against the firm.

Id.

A legatee under the will of the deceased partner, who allows his legacy to remain in the firm business drawing interest upon it, thereby waives his right to insist upon its payment out of the estate.

Id.

II. POWER OF PARTNERS.

Where one partner was to have sole charge of the accounts, and entries were made by other partners, the former is not liable for all errors in the accounts.

Jarvis v. Brooklyn Elev. R. R. Co., 133 N. Y. 623.

One partner authorized to settle the firm affairs may maintain an action for accounting.

Watts v. Adler, 130 N. Y. 646.

An action may be maintained by a portion of a firm against the remaining member upon an express promise.

Bank of British N. A. v. Delafield, 126 N. Y. 410.

An assignee of a firm may recover money loaned the partner after sufficient proof that the defendant was indebted in a greater amount than the sum assigned.

Id.

A surviving partner is entitled to contribution from the estate of the deceased partner, for disbursements made in the course of an attempt to collect funds of a partnership.

Preston v. Fitch, 137 N. Y. 41.

Where the assignee of the surviving partner in the attempted enforcement of the firm debt buys in at a foreclosure sale property covered by a mortgage given to secure such debt, he takes such property burdened with an obligation in the nature of a trust in favor of the deceased partner.

Id.

The appropriation of property of a firm for the payment of a debt for which all the partners are individually liable is not in law fraudulent.

Citizens' Bk. v. Williams, 128 N. Y. 177.

Joint and several notes of partners given for another partner's indebtedness are not a fraud on firm creditors.

Hannigan v. Allen, 127 N. Y. 639.

III. RIGHTS AND LIABILITIES.

What will not defeat the right of partner to equitable relief for an accounting.

Spears v. Willis, 151 N. Y. 443.

Partnership—Continued.

A person who forms a partnership and is induced thereto by fraud is entitled to have a partnership agreement canceled.

Harlow v. La Brum, 151 N. Y. 278.

A firm which succeeds to the assets and liabilities of a prior firm is liable to a creditor only for the amount appearing on the books of the old firm.

Corner v. Mackey, 147 N. Y. 574.

The principle of novation does not apply where a new firm has not assumed liability to a creditor beyond the indebtedness appearing on the books of the old firm.

Id.

A surviving partner is chargeable with the proper distribution of the assets of the firm.

Russell v. McCall, 141 N. Y. 437.

Recovery against a surviving partner is no bar to an action against third persons for interference with the estate.

Id.

The fact that a partner is a creditor of the firm does not relieve him from liability.

Id.

An incoming partner is not liable for the debts or transactions of the firm, and he can be made liable in an action at law by the creditor only by some agreement on his part to assume such liability, which must be proven to charge him.

Peyser v. Myers, 135 N. Y. 599.

A release which discharges all the members of the firm and all other persons, except one partner named, releases a dormant partner unknown to creditor.

Harbeck v. Pupin, 145 N. Y. 70.

A partnership firm, some of whose members compose another firm, may give to the latter of the members thereof notes in settlement of an account between the firms.

First Nat. Bk. v. Wood, 128 N. Y. 35.

It seems that in such case an action may be maintained upon the notes without a partnership accounting.

Id.

An action for the price of goods sold by one firm to another may be maintained, although one of the partners belongs to both firms.

Schnaier v. Schmidt, affirmed without opinion, 128 N. Y. 683.

IV. RIGHTS OF CREDITORS.

One who receives a firm check in payment of a draft upon a member thereof, is not chargeable with notice that the draft was paid with firm moneys.

Wheatland v. Pryer, 133 N. Y. 97.

Where each partner contributed to the capital a stock of goods he had on hand, portions of the purchase-price of which were unpaid, and the firm assumed and agreed to pay the balance, a creditor could sue the firm upon the agreement.

Hannigan v. Allen, 127 N. Y. 639.

A creditor of the old firm who continues the loan with the new firm, which reduces its amount from time to time by payments, becomes a creditor of such new firm.

Columbus Watch Co. v. Hodenpyl, 135 N. Y. 430.

Partnership—Continued.

The priority of lien upon the firm asset of partnership over individual creditors is not divested by a mere change in the personnel of the firm by the withdrawal of one partner and the introduction of a new member.

Peyser v. Myers, 135 N. Y. 599.

One jointly interested with a partner, though unknown to a co-partner, may maintain an action for accounting.

Nerdlinger v. Bernheimer, 133 N. Y. 45.

In such case defendants cannot raise the question on appeal as to whether the sub-partner paid his proportion of the outlay. *Id.*

Accounts rendered to the partner bind defendants as to sub-partner. *Id.*

After the death of such partner and sub-partner the court may order the business to be continued. *Id.*

V. FIRM PROPERTY.

The principle which allows a *cestui que trust* to follow trust funds, etc., enables the surviving partner of a firm to recover the entire proceeds of policies obtained by moneys wrongfully taken by partner.

Holmes v. Gilman, 138 N. Y. 369.

A partner assigned his life insurances to the firm, but later they were reassigned; the premiums were paid through the firm, but a large balance was always due the partner; *held*, that a finding that the executor was entitled to the benefit of policies was warranted by evidence.

Bartlett v. Goodrich, 153 N. Y. 421.

When firm will be bound by act of one partner in borrowing money to buy land though he take the title in his own name.

Rumsey v. Briggs, 139 N. Y. 323.

A mortgage executed by a surviving partner to secure money, borrowed for the use of the firm business, which he was continuing under authority, is binding upon the mortgaged property.

Bell v. Hepworth, 134 N. Y. 442.

Even if a provision in a partnership agreement for the continuance of the business for five years after the death of a partners be invalid and not binding upon the executors and trustees of a partner subsequently dying, the latter are not bound to require the immediate winding up of the firm affairs. *Id.*

VI. DISSOLUTION.

Dissolution of partnership at will may be implied.

Spears v. Willis, 151 N. Y. 443.

Upon dissolution an action in equity for an accounting is the proper method.

Watts v. Adler, 130 N. Y. 646.

Where the claim of one not connected with the firm is not pleaded, it may be disregarded.

Turner v. Weston, 133 N. Y. 650.

Partnership—Continued.**VII. LIMITED PARTNERSHIP.**

Section 13 of the Limited Partnership Act, as amended in 1866, does not authorize the use of the words "and company" or "& Co." in the firm name, where there is but one general partner. *Buck v. Alley*, 145 N. Y. 488.

A non-resident special partner is not entitled, on an assessment of the sum invested by him in the firm, to a deduction of any portion of the firm indebtedness.

People ex. rel. Bird v. Barker, 145 N. Y. 239.
The act of a special partner in bringing an action for the dissolution of the partnership before the expiration of its term, and procuring himself to be appointed its receiver, is not such an interference as will render him generally liable to creditors.

Continental Nat. Bk. v. Strauss, 137 N. Y. 148.
The fact that one of the general partners is an infant does not deprive the special partner of immunity from general liability to creditors. *Id.*

Party-Wall ; See Easements.

Are not required to be absolutely solid under all circumstances. *Hammann v. Jordan*, 129 N. Y. 61.

Recovery may be had under an agreement to pay one-half the expense upon using such wall, though the wall contained flues. *Id.*

An unintentional encroachment of such flues on defendant's line will not prevent recovery. *Id.*

If the encroachment is a substantial departure from the contract there can be no recovery. *Id.*

One of the owners of a party-wall does not become insurer as to the other owner who built it, and is not liable for injuries occurring in the progress of the work.

Negus v. Becker, 143 N. Y. 303.

Passengers ; See Carriers ; Negligence ; Railroads.**Patents.**

A party who has tested machines for several years cannot claim false representation in regard to such machine.

Arnold v. Norfolk & New Brunswick Hosiery Co., 148 N. Y. 392.

What an assignment of a patent and similar future inventions must contain. *Allison Brothers Co. v. Allison*, 144 N. Y. 21.

An assignment of a patent and "any improvements on the same which may hereafter be made" does not cover a subsequent independent invention. *Id.*

Patents—Continued.

When the relation of attorney and client is dissolved by the assignment of the rights of the client to a corporation.

Foster v. Bookwalter, 152 N. Y. 166.

Want of consideration through invalidity of patent is a valid defense for action for royalties constituting the purchase-price of said patent.

Herzog v. Heyman, 151 N. Y. 587.

It is not necessary to reassign the patent as a consideration precedent to interposing its validity as defense.

Id.

Jurisdiction of state court to determine a defense of want of consideration in an action for purchase of patent.

Id.

Section 4898 U. S. R. S. does not preclude the acquisition of evidence by oral agreements.

Spears v. Willis, 151 N. Y. 443.

Where there is no express agreement as to royalties, an inventor is entitled to a reasonable price for the use of his patent with his consent.

Griffin v. White, 142 N. Y. 539.

Where an article is not manufactured under an agreement with the holder of the patent, no action for royalties can be maintained.

Denise v. Suett, 142 N. Y. 602.

The renunciation of the protection of a patent by a license must be clear and unmistakable.

Skinner v. Walter A. Wood Mowing and Reaping Machine Co., 140 N. Y. 217.

An assertion of the invalidity of a patent and mere refusal to pay royalties does not relieve the licensee from liability.

Id.

Patent for Land; See Commissioners of Land Office; Title to Lands.

A patent for land under water issued by the commissioner of the land office, which is not void on its face, and which requires evidence *dehors* the instrument to show its invalidity, can only be assailed in a direct proceeding to review the action of the commissioners, or by an action in equity to set aside the patent.

N. Y. Central, etc., R. R. Co. v. Aldridge, 135 N. Y. 83.

Such patent cannot, therefore, be disregarded in an action of ejectment on the ground that the grantee was not the owner of the upland.

Id.

Paupers; See Poor and Poor-Houses.

Payment; See Accord and Satisfaction; Bills and Notes; Judgment; Mortgages; Release; Tender.

I. NATURE AND EFFECT.

II. APPLICATIONS OF PAYMENTS.

Payment—Continued.**I. NATURE AND EFFECT.**

Where an assessment is void for want of jurisdiction of the assessors, an action may be maintained to recover the taxes paid without having the assessment set aside first.

Ætna Ins. Co. v. Mayor, 153 N. Y. 331,

Payment by a bank of a tax on shares of its stock held by a foreign insurance company is not such a voluntary payment as to prevent recovery of the money paid. *Id.*

Where there is no agreement upon the transfer of a check on account of an indebtedness, it is not to be considered as absolute satisfaction. *Carroll v. Sweet*, 128 N. Y. 19.

Delay in presentment of check at request of maker and without consent of indorser makes holder liable for loss and discharges indorser. *Id.*

Where it was shown that the account against which a check was drawn in such case was not good, the inference of injury from non-presentment would be rebutted. *Id.*

Advancing money to secure performance of an agreement is not voluntary payment. *Bork v. Martin*, 132 N. Y. 280.

Provisions in a will may be made to discharge any payment due legatee upon acceptance of such provisions.

McLaughlin v. Webster, 141 N. Y. 76.

The giving of a note raising the presumption of the settlement of all prior accounts between the parties.

Matter of Callister, 153 N. Y. 294.

When an action to recover back moneys paid upon an alleged illegal tax cannot be maintained.

United States Trust Co. v. Mayor, 144 N. Y. 488.

Payment of an assessment which is void for want of jurisdiction, made in ignorance of the defects, is not voluntary.

Mutual Life Ins. Co. v. Mayor, 144 N. Y. 494.

An omission to comply with the provisions of the statute requiring competitive bidding is a jurisdictional defect, and is void.

Id.

When payment of an illegal assessment will not be deemed voluntary. *Poth v. Mayor*, 151 N. Y. 16.

Provisions of section 903 of the Consolidation Act, applied. *Id.*

II. APPLICATION OF PAYMENTS.

A sub-contractor is not prevented from applying a payment received from the contractor upon an antecedent debt by the fact that the moneys paid were received from the owner upon the contract. *Mack v. Colleran*, 136 N. Y. 617.

In the absence of evidence of an agreement or of an application or of equities requiring a different construction, payments made by the debtor will be applied in payments of the debt longest standing. *Pond v. Harwood*, 139 N. Y. 111.

Payment—Continued.

Where a mortgage given to secure a general indebtedness is foreclosed, and the proceeds on the sale is insufficient, they must be applied *pro rata* on all the debts, even though some are otherwise secured. *Armstrong v. McLean*, 153 N. Y. 490.

The rule is that where payments are made generally to a party who holds several obligations against the payor, which are not applied by either party, the court will make such application of the payment as equity and justice require according to its own notions of the intrinsic equity and justice of the case.

Camp v. Smith, 136 N. Y. 187.

Payments made by an individual out of his individual funds will be first applied by the court upon his individual obligations. *Id.*

The fact that the person making the payments has been deprived of their benefit in proceedings to enforce his individual liability and prevented from testifying as a witness in regard thereto, in consequence of which the individual claim was fully enforced, will not authorize the court in a subsequent action upon the firm indebtedness to apply such payments thereto at the instance of the creditor for the purpose of taking the claim out of the Statute of Limitations. *Id.*

Payment into Court ; See *Tender*.**Penalties ; See *Damages ; Statutes*.****Pendency of Action ; See *Notice of Pendency of Action*.****Perjury ; See *Criminal Law*.**

What indictment for perjury in making and filing an affidavit must be alleged and what must be proved on trial.

People v. Williams, 149 N. Y. 1.

Postponement of a trial for perjury in a civil action does not involve question of jurisdiction. *People v. Hayes*, 140 N. Y. 484.

Perpetuities ; See *Trusts*.

Absolute ownership of property and power of alienation are not suspended merely because the executor may require a period of time not measured by lives in which to execute the power of sale.

Deegan v. Wade, 144 N. Y. 573.

A direction to the executor to sell land at public auction at some convenient time in the spring following testator's death does not violate the Statute of Perpetuities. *Id.*

Case where a trust was not void as unduly suspending the power of alienation. *Montignano v. Blade*, 145 N. Y. 111.

Personal Property ; See *Chattels ; Chattel Mortgages ; Conversion*.

Physicians ; *See Witness.*

A party calling one of the two physicians who attended him waives privilege by section 834 of the Code to object to the testimony of the other as to the transaction where both attended. *Morris v. N. Y., O. & W. R. R. Co.*, 148 N. Y. 88.

Plank Road Companies ; *See Corporations ; Highways.***Pleadings ;** *See Equity ; Justice's Court.*

- I. REQUISITES AND CONSTRUCTION.
- II. PARTIES.
- III. COMPLAINT.
- IV. ANSWER.
- V. REPLY.
- VI. DEMURRER.
- VII. SUPPLEMENTAL PLEADINGS.
- VIII. BILL OF PARTICULARS.
- IX. AMENDMENT.

I. REQUISITES AND CONSTRUCTION.

Pleadings will be deemed to allege whatever can be implied by fair and reasonable intendment.

Kain v. Larkin, 141 N. Y. 144.

When the objection to the validity of a law arises out of the failure of the legislature to comply with the procedure pointed out by the provisions of the Constitution, the facts must be distinctly pleaded.

Waterloo Woolen Mfg Co. v. Shanahan, 128 N. Y. 345.

Where a second mortgage was fraudulently given, rents dishonestly appropriated and the complaint demanded an accounting, redemption and cancellation of second mortgage, but one cause of action is pleaded.

Johnson v. Golder, 132 N. Y. 116.

Where the complaint alleged that plaintiff's testatrix died in 1880, leaving a will probated in February, 1880, it will be inferred that the death occurred before foreclosure.

Id.

The remedy for such omission is by motion to make more definite.

Id.

What discrepancies between pleading and proof not of sufficient importance to call for a reversal in action for negligence.

Lynch v. Third Ave. R. R. Co., affirmed without opinion, 128 N. Y. 681.

Allegation of insanity must be specifically alleged and not deduced from other statements.

Aldrich v. Bailey, 132 N. Y. 85.

Defendants, sued for the purchase-price of goods proved to have been accepted, cannot prove under a general denial that after

Pleadings—Continued.

delivery they complained of the quality of the goods and by agreement held goods for plaintiff.

Wallace v. Blake, 128 N. Y. 676.

Cause of action for slander and false imprisonment cannot be joined in the same complaint.

De Wolfe v. Abraham, 151 N. Y. 186.

When the complaint alleges an answer does not deny dissolution of a corporation, the fact that defendant was appointed receiver sufficiently appears.

Ludington v. Thompson, 153 N. Y. 499.

A newspaper article stating that plaintiff "had left the city with \$8,500 of the Southern Bank's money" is libelous *per se*.

Turton v. New York Recorder Co., 144 N. Y. 144.

An allegation in the complaint that by reason of the publication plaintiff has been "held up to the public, his business acquaintances and friends as a thief and a dishonest and untrustworthy man," is a sufficient innuendo.

Id.

It is not a condition precedent to the enforcement of a bond given to discharge a mechanic's lien that a judgment in form against the property should be recovered.

Morton v. Tucker, 145 N. Y. 244.

The complaint in such an action should be in the usual form, but should allege the giving of the bond and discharge of the lien and demand relief against the persons who executed the bond.

Id.

An allegation that money received under an oral trust was fraudulently appropriated and converted does not sustain charge of trover.

Bork v. Martin, 132 N. Y. 280.

Facts may be stated according to their legal effect.

Rochester Ry. Co. v. Robinson, 133 N. Y. 242.

Performance of statutory conditions precedent may be alleged generally in the terms of statute.

Id.

Where the allegation follows the words of the statute, it is sufficient.

Id.

Any agreement intending to operate as discharge of a debt may be proven under a general plea of judgment.

McLaughlin v. Webster, 141 N. Y. 76.

Where the performance of a condition precedent is necessary to recovery, such performance must be shown or sufficient excuse for non-performance must be proved.

Weeks v. O'Brien, 141 N. Y. 199.

In an action to recover commission for lands sold in another state, it is sufficient to aver that such contracts are held void in said state.

Angell v. Van Schaick, 132 N. Y. 187.

Claim for rents and profits is recoverable in ejectment under the allegation of damages for withholding possession.

Clason v. Baldwin, 129 N. Y. 183.

Pleadings—Continued.

Such recovery cannot include a claim for rents and profits prior to the action. *Id.*

II. PARTIES.

In an action by a bondholder of a railroad corporation brought against the trustee named in the mortgage who had bid in the property upon a foreclosure thereof, for an accounting, the corporation to which the property was conveyed by the trustee in effecting a reorganization was not a necessary party.

Zebley v. Farmers' Loan and Trust Co., 139 N. Y. 461.

It is not necessary that all the occupants should be made defendants in an action of ejectment.

Hennessey v. Paulsen, 147 N. Y. 255.

A creditor's action to set aside a general assignment cannot proceed after the death of assignor, unless his personal representative is made a party.

First Nat. Bk. of Amsterdam v. Shuler, 153 N. Y. 163.

In an action to enjoin the operation of an elevated road, and for damages, the fact that during part of the time the premises had been in possession of lessees of plaintiff did not disentitle the latter to recover.

Moore v. N. Y. Elevated R. R. Co., reversed on other grounds, 126 N. Y. 671.

Who may maintain action where a debtor has assigned property to a third person in trust for the payment of his obligations.

Pendergast v. Greenfield, 127 N. Y. 23.

A temporary receiver may maintain an action to collect a judgment entered against the corporation in contemplation of insolvency.

Nealis v. American Tube & Iron Co., 150 N. Y. 42.

It is not enough for the court to direct that the necessary parties be brought in, but it should refuse to proceed to a determination of the controversy, so as to affect their rights, until they are in fact brought in.

Mahr v. Norwich Union Fire Ins. Soc., 127 N. Y. 452.

Where two persons severally claim insurance moneys, the one as equitable and the owner as legal owner, the court should not enjoin the company from paying the money to the latter in an action to which he is not a party. *Id.*

Not only all persons whose rights may be affected by the judgment should be brought into court, but any whose presence is essential to protect a party. *Id.*

An order requiring a person to be brought in while it remains in force is an adjudication that such person is a necessary party. *Id.*

It will defeat the action if one who is necessarily a party is so

Pleadings—Continued.

named in the proceedings, but the court has never acquired jurisdiction over him by proper service of process. *Id.*

When the personal liability of the directors under section 24 of the Stock Corporation Law may be enforced.

National Bank of Auburn v. Dillingham, 147 N. Y. 603.

The right of action given under said section applies to all creditors. *Id.*

A bondholder may maintain an action for specific performance of a division in a bond given by organizers of the railroad that they will convey certain property to the trustee.

O'Beirne v. Alleghany & Kinzaa R. R. Co., 151 N. Y. 372.

In an action to again foreclose a mortgage against a junior mortgagee who was not made a party to the first action brought by the prior mortgagee, who had purchased a portion of the premises under the first foreclosure, all the other purchasers under such foreclosure of the remaining portions of the premises are necessary parties.

Moulton v. Cornish, 138 N. Y. 133.

The judgment debtor against whose property the execution was issued may be made party under section 452 of the Code in an action of replevin against the sheriff, brought by a claimant of goods.

Rosenberg v. Salomon, 144 N. Y. 92.

The owner is not a necessary party plaintiff to an action on a policy of fire insurance, by its terms payable to the mortgagee.

Hathaway v. Orient Ins. Co., 134 N. Y. 409.

A village may maintain an action against a county to have the amount of taxes paid by a railroad, in aid of which it was bonded, refunded to it in conformity with the requirements of statute requiring such taxes to be appropriated to the payment of the bonds issued by the municipalities which have aided in the construction of the railroad.

Village of Oneida v. Supervisors of Madison, 136 N. Y. 269.

Where an estate is vested in persons living subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate for all purposes of any litigation in reference thereto and affecting the jurisdiction of the courts to deal with the same, represent the whole estate and stand not only for themselves, but also for the persons unborn.

Kent v. Church of St. Michael, 136 N. Y. 10.

Where land did not actually pass to the defendants in the action, but was conveyed by their testator in his lifetime to one who lost the deed before it was recorded, and the action is brought in behalf of those succeeding to his interest to perfect the record title by the execution of a deed, the living parties will be deemed to represent the unborn. *Id.*

Where grandchildren take a vested remainder in property left to their parents, they are necessary parties in a partition suit.

Campbell v. Stokes, 142 N. Y. 23.

Pleadings—Continued.

Where a contract purported to be made by a committee for the benefit of plaintiff, *held*, that plaintiff had such an interest as enabled it to maintain an action on the contract.

Societa Italiana Di Beneficenza v. Sulzer, 138 N. Y. 468.

Tenants in possession should be made parties defendant with their landlord in a suit for ejectment.

Clason v. Baldwin, 129 N. Y. 183.

An assignee in bankruptcy should be made a party to foreclosure proceedings in order to cut off his interest.

London v. Townshend, 129 N. Y. 166.

All the parties to a plan for the commission of a fraud are proper parties to an action to set the deed aside.

Watts v. Wilcox, affirmed without opinion, 128 N. Y. 614.

An action in which executors upon an express trust are designated "as executors," and not "as trustees," is not improperly brought under such titles.

Knox v. Metropolitan Elevated R. Co., affirmed without opinion in 128 N. Y. 625.

As the complaint shows the proper representative character of the plaintiffs, the erroneous description in the caption would be immaterial. *Id.*

Executors who have claimed title to bonds which they have given notice not to transfer are proper parties as individuals as well as executors, when an action is brought to test ownership.

Newcomb v. Lattimer, affirmed without opinion, 128 N. Y. 618.

In an action by the representatives of a sub-partner, for an accounting, the trustee of partnership property is a necessary party.

Nerdlinger v. Bernheimer, 133 N. Y. 45.

Where a partner refuses to act as plaintiff, and is made defendant, he cannot subsequently insist upon his right to become a plaintiff.

Schnaier v. Schmidt, affirmed without opinion, 128 N. Y. 683.

Principle of *Burnett v. Snyder*, 81 N. Y. 551, that an assignee of a share of a partner's interest in a firm, although not a member of the firm or responsible for its debts, upon the death of his assignor, may, as *cestui que trust*, maintain an action for an accounting against the survivors, affirmed.

Stokes v. Stokes, affirmed without opinion, 128 N. Y. 615.

In an action by an assignee of a deceased partner for an accounting, the executors of another deceased partner are necessary parties. *Id.*

A lunatic cannot be sued without leave of the court for debts incurred prior to his lunacy. *Carter v. Beckwith*, 128 N. Y. 312.

Where no assertion is made that the grantor was without title, a mortgagee is not a necessary party in an action against a subsequent grantee.

Hughes v. Met. Elevated Ry. Co., 130 N. Y. 14.

Pleadings—Continued.

When obligees in a bond, described as agents, were the only persons who could maintain an action on the bond.

Henricus v. Englehart, 137 N. Y. 488.

An action commenced by a receiver may be continued notwithstanding the appointment of his successor.

Hegeswich v. Silver, 140 N. Y. 414.

The fact that commissioners were elected at an election participated in by the electors residing in a city since incorporated within the limits of the town, does not make the city a necessary party in an action against the town.

Embler v. Town of Walkill, 132 N. Y. 222.

What unknown parties were properly designated under Code Civil Procedure (§ 451); and that judgment could be entered against them without evidence, that they were in fact unknown or absentees or that the mortgagor died without heirs-at-law or next of kin.

Moran v. Conoma, affirmed without opinion, 128 N. Y. 591.

A vested remainderman may have an injunction issued founded upon an injury to the inheritance.

Thompson v. Manhattan Ry. Co., 130 N. Y. 360.

A trustee holding a policy of insurance as mortgagor may recover therein.

Weed v. Hamburg-Bremen Fire Ins. Co., 133 N. Y. 394.

Application to be made a party after affirmance, where applicant had knowledge of beginning and prosecution of suit, is too late.

Brennan v. Hall, 131 N. Y. 160.

Party in interest may maintain an action in his own name.

Goodsell v. Western Union Tel. Co., 130 N. Y. 430.

III. COMPLAINT.

In an action against joint survivors and the representatives of decedent, for breach of contract, the complaint must aver that the survivor is unable to pay.

Barnes v. Brown, 130 N. Y. 372.

The omission of such averment is open to objection on trial. *Id.*
Plaintiff is not entitled to amendment of defect as a matter of right on trial. *Id.*

In case of a transfer of plaintiff's interest after suit, the fact should be brought to notice of the court by motion.

McGean v. Met. Elevated R. R. Co., 133 N. Y. 9.

A complaint alleging fraud and that other parties were authorized to consummate a contract, contains good cause of action.

Birge v. Berlin Iron Bridge Co., 133 N. Y. 477.

What allegations in answer might be treated as an admission that the instrument causing injury was under the control of, and was left in the highway by, defendant's commissioner of highways. *Whitney v. Town of Ticonderoga*, 127 N. Y. 40.

Pleadings—Continued.

Complaint in action to recover profits from patents, *held*, that it stated a sufficient cause of action.

Dalzell v. Fahys Watch Case Co., 138 N. Y. 285.

An exception to the conclusion of law by referee that plaintiff was entitled to recover occupancy of land, made the point that the contract was void under the statute available on appeal, although the statute had not been pleaded.

English v. Marvin, 128 N. Y. 380.

In an action to recover amount of award, the complaint must allege a record of award, and its non-payment.

Lent v. N. Y. & Mass. Ry. Co., 130 N. Y. 504.

In breach of contract for payment of money non-payment must be alleged and proved. *Id.*

Where the complaint alleges that the acts of the debtor were in fraud of the creditors' rights, it is not necessary to allege that judgment creditors knew of the contemplated assignment.

Spelman v. Freedman, 130 N. Y. 421.

The complaint will be deemed to allege every fact which can by reasonable and fair intendment be implied from its statements. *Zebley v. Farmers' Loan and Trust Co.*, 139 N. Y. 461.

It seems that the objection that the demand sued upon in equity is stale cannot be raised by a general demurrer. *Id.*

The pendency of another action for the same purpose, or in which the same relief could be obtained, cannot be urged on appeal in support of a demurrer which does not specify it as a ground. *Id.*

What a complaint in an action to enforce the liability of the stockholder of a bank under section 52 of the Banking Law must allege.

Hirshfeld v. Bopp, 145 N. Y. 84.

The complaint in such an action need not allege that the defendant became a stockholder after the passage of the act. *Id.*

A complaint in an action by a stockholder against directors, *held*, sufficient.

Sage v. Culver, 147 N. Y. 241.

A complaint in an action upon an account stated need not allege the subject-matter of the original debt.

Schutz v. Morette, 146 N. Y. 137.

The legal or equitable character of an action is not determined by the formal demand for relief in the complaint.

O'Brien v. Fitzgerald, 143 N. Y. 377.

If libelous words are equivocal, innuendoes pointing to the injurious intent or meaning are necessary.

Hemmens v. Nelson, 138 N. Y. 517.

Even though a complaint be insufficient in some respects, if an answer has been served and trial had, and every essential fact proven and found by the court, the plaintiff is entitled to any relief consistent with the case made by the complaint and embraced within the issues.

Rogers v. N. Y. & Texas Land Co., 134 N. Y. 197.

Pleadings—Continued.

Complaint by holders of income bonds for an accounting, *held*, sufficient.

Thomas v. N. Y. & Greenwood Lake Ry. Co., 139 N. Y. 163. Question of what expenses were properly chargeable was one of law, and the necessary facts should have been alleged establishing the legal conclusion. *Id.*

Complaint in an action for the dissolution of a railroad corporation for failure to exercise its franchise, *held*, sufficient.

People v. N. Y. City Central Underground Ry. Co., affirmed without opinion in 137 N. Y. 606.

A defect in a pleading of parties plaintiff is waived when not taken by answer or demurrer.

Duncan v. China Mut. Ins. Co., 129 N. Y. 237.

In slander, the repetition of words of similar import to those charged in the complaint may be proven as bearing upon the question of malice. *Enos v. Enos*, 135 N. Y. 609.

Words proved as repetitions of the slander are not an independent cause of action. *Id.*

Where the defense in an action for negligence is that it was the act of an independent contractor, the action cannot be maintained upon the ground that the defendant agreed to make good the plaintiff's damages. *Roemer v. Striker*, 142 N. Y. 134.

A complaint in an action by a bondholder of a railroad corporation brought for an accounting against the trustee, *held*, sufficient upon a demurrer on the ground that it did not state a cause of action.

Zebley v. Farmers' Loan & Trust Co., 139 N. Y. 461.

IV. ANSWER.

It seems that an allegation that eight years have elapsed is a sufficient plea of the six years' Statute of Limitations.

Camp v. Smith, 136 N. Y. 187.

Facts relied upon in aggravation of damages in libel must be pleaded though the publication be libelous *per se*.

Cassidy v. Brooklyn Daily Eagle, 138 N. Y. 239.

A railroad company intending to claim immunity from a liability under some statute should plead the facts upon which they would claim immunity.

Vail v. Broadway R. R. Co., 147 N. Y. 377.

Where an answer does not set up the objection that the plaintiff has an adequate remedy at law it cannot be raised on the trial. *Crisfield v. Murdock*, 127 N. Y. 315.

Under the denial of the execution and delivery of a bond, the party denying may show that he signed the instrument in blank with the understanding that it should be filled out in a particular way which was not followed.

Richards v. Day, 137 N. Y. 133

Pleadings—Continued.

Where a complaint on contract does not show the contract sued on to be invalid under the Statute of Frauds, the statute is waived by defendant unless specially pleaded as a defense.

Crane v. Powell, 139 N. Y. 379.

Ownership by corporation and not by defendants as stockholders may be proven under general denial of defendants, liability for negligence.

Demarest v. Flack, 128 N. Y. 205.

An affirmative defense is to be treated as a separate plea, and on demurrer thereto defendant is not entitled to have the benefit of denials made in another part of the answer.

Douglass v. Phoenix Ins. Co., 38 N. Y. 209.

Where defendant had interposed a counter-claim, invalid as such or as a defense, a ruling compelling her to elect whether she would stand upon the answer which denied the contract sued on or the counter-claim which was inconsistent therewith, if erroneous, was not ground for reversal.

Societa Italiana Di Beneficenza v. Sulzer, 138 N. Y. 468.

It seems that a defendant may set up as many defenses as he may have, whether inconsistent or not.

Id.

A separate answer and defense in an answer for goods sold, that defendants became privy to the contract as guarantors and counter-claiming damages for breach of the contract by plaintiff, held, to state new matter within Code Civil Procedure (§ 494), authorizing a demurrer to a counter-claim.

Newton v. Lee, 139 N. Y. 332.

In an equitable action where all the facts are alleged in the answer, proved upon the trial and found by the jury, the court has power to administer affirmative relief to the defendant, although it was not specifically prayed for.

House v. Lockwood, 137 N. Y. 259.

Where the complaint in an action upon town bonds is ambiguous, in an accounting not only on the bonds, but in case they are found invalid, upon an implied contract for repayment of the money loaned thereon, a plea of the Statute of Limitations furnishes a good defense to the latter cause of action.

Smith v. Town of Greenwich, 145 N. Y. 649.

The defense to a promissory note, that by its terms it is not payable until a surrender of collateral security, should be set up in the answer.

Coffin v. Grand Rapids Hydraulic Co., 136 N. Y. 655.

An answer admitting the making and delivery of the notes sued on, but alleging that they were made and delivered pursuant to an agreement annexed to such answer, sets up an affirmative defense.

Id.

The defense that the note, being made to plaintiffs as agents they were not the proper persons to receive and enforce payment must be set up in the answer.

Id.

Pleadings—Continued.

Defendant cannot, under a general denial, prove that a written contract valid upon its face was in fact void.

Milbank v. Jones, 127 N. Y. 370.

The provision for waiver (Code Civil Procedure, §§ 498, 499) relates only to defects in the complaint and a waiver by the defendant.

Lipman v. Jackson Architectural Iron Works, 128 N. Y. 58.

The defense that a corporation was organized for illegal purposes, and was not organized at all, may be pleaded.

U. S. Vinegar Co. v. Schlegel, 143 N. Y. 537.

The fact that plaintiff, suing for an injunction against a trespass, should first establish at law his title at law must be heard.

Baron v. Korn, 127 N. Y. 224.

Under a general denial the act complained of may be shown to be that of an independent contractor.

Roemer v. Striker, 142 N. Y. 134.

Where a party pleads condemnation proceedings, it is an admission that he did not own the property concerned.

Hughes v. Met. Elevated R. R. Co., 130 N. Y. 14.

Although an admission in an answer, whether implied or direct, is conclusive upon the defendant, plaintiff can refer to it as conclusive proof of the truth of his allegation, and an allegation in the answer setting up an affirmative defense, which has no reference to and does not admit any allegation of the complaint, is of an entirely different character.

Ferris v. Hard, 135 N. Y. 354.

Where upon the pleadings equitable relief may be granted, the defense that there exists a sufficient remedy at law must be pleaded.

Lough v. Outherbridge, 143 N. Y. 271.

Statute of Frauds is not available where it has not been pleaded by the answer.

Wells v. Monihan, 129 N. Y. 161.

In an action of ejectment a demand for the payment of a legacy is not allowed as a counter-claim.

Dinan v. Coneys et al., 143 N. Y. 544.

Where defendant does not plead want of equitable jurisdiction, nor allege adequate legal remedy, he cannot insist that an action in equity will not lie.

Watts v. Adler, 130 N. Y. 646.

Under a general denial, the defendant may controvert by evidence anything which the plaintiff is bound to prove.

Milbank v. Jones, 141 N. Y. 340.

A cause of action proved but not pleaded is subject to any defense which may exist.

Id.

V. REPLY.

Where the answer forms a complete defense no reply is necessary.

Walker v. Am. Central Ins. Co., 143 N. Y. 167.

Pleadings—Continued.**VI. DEMURRER.**

An objection that the claim is stale cannot be presented by demurrer. *Sage v. Culver*, 147 N. Y. 241.

Demurrer is the only method by which defect of non-joinder of parties may be raised.

Nealis v. American Tube & Iron Co., 150 N. Y. 42.

In an action brought by trustees of a corporation under a liquidation agreement for goods sold by them to defendant counter-claims were plead in answers, *held*, Code Civil Procedure (§§ 495, 496) did not apply; that a demurrer, under Code Civil Procedure (§ 494), raised questions that the counter-claims were insufficient in law upon the face thereof.

Otis v. Shants, 128 N. Y. 45.

Demurrer to answer must be sustained when answer alleges fraud of persons not in action. *Id.*

Transactions between defendant and the corporation, prior to the liquidation agreement, were not proper subjects of counter-claim. *Id.*

The question whether the complaint states a cause of action should be raised by demurrer or upon the trial.

Hoffman v. Wight, 137 N. Y. 621.

The omission to allege the amount of stock held by defendant in an action to enforce a stockholder's liability for failure to file certificate of payment of capital stock is not demurrable.

Rowell v. Janvrin, 151 N. Y. 60.

What the complaint in an action to enforce the liability of a stockholder of a manufacturing company for a debt by reason of failure to file certificate of payment of capital stock must allege. *Id.*

A complaint in partition by one tenant in common alleged that defendants "claim some right, title or interest in said premises, the exact nature of which is unknown to the plaintiff, and which is a cloud upon the title to said premises," is not demurrable as to the latter defendants on the ground that it states no cause of action against them. *Townsend v. Bogart*, 126 N. Y. 370.

Such defendants may safely disregard the action or may answer showing that their presence is unnecessary. *Id.*

VII. SUPPLEMENTARY PLEADINGS.

Where it was sought to prove disbursements by means of a surrogate's decree entered since suit brought, application should be made under Code Civil Procedure (§ 544) to serve a supplemental complaint. *Lawrence v. Church*, 128 N. Y. 324.

When a refusal to allow an amendment on ground of mistake is harmless.

Christopher & Tenth St. R. R. Co. v. Twenty-third St. R. Co., 149 N. Y. 51.

Pleadings—Continued.

A stipulation authorizing plaintiff's attorney to serve an amended or supplemental complaint authorizes such an amendment as the court has power to grant.

Deyo v. Morss, 144 N. Y. 216.

The court has power under section 723 of the Code to authorize an amendment of a complaint before trial even though cause of action be changed. *Id.*

When a complaint in an action for partition brought by an heir-at-law of testator under section 1537 of the Code cannot be amended. *Ellerson v. Westcott*, 148 N. Y. 149.

VIII. BILL OF PARTICULARS.

When defendant is in doubt as to identity of claim, his remedy is by motion to make more definite, or for a bill of particulars.

New York News Pub. Co. v. Nat. Steamship Co., 148 N. Y. 39.

IX. AMENDMENT.

Where an amendment is allowed, the construction given to pleadings should be followed on appeal.

Miller v. Union Switch & Signal Co., 132 N. Y. 562.

Where an action is proved void under the Statute of Frauds, it is error to permit recovery for value of property delivered under the contract without amendment.

Reed v. McConnel, 133 N. Y. 425.

Pledge; See Bailments; Banks; Chattel Mortgage; Debtor and Creditor.

Rights of the true owner of stock wrongfully pledged to notice of sale and surplus, considered.

Le Marchant v. Moore, 150 N. Y. 209.

Where a creditor surrenders notes of a third party to the maker thereof without consideration, substituting therefor the obligation of the maker, the debtor can only charge him with the actual value of such notes. *Griggs v. Day*, 136 N. Y. 152.

Where plaintiff pledged bonds under an agreement that they may be sold upon default without notice, conversion will not lie for such a sale. *Williams v. U. S. Trust Co.*, 133 N. Y. 660.

Where pledgor had access to the property pledged the care of it does not devolve upon the pledgee.

Willets v. Hatch, 132 N. Y. 41.

Such pledgee does not prevent preservation of goods by refusing to allow pledgor to take them into his own possession to protect them. *Id.*

A pledgee of stock for value is not deprived of his right by the fact that the owner of the stock executed a power of attorney to the pledgor upon a detached piece of paper.

Smith v. Savin, 141 N. Y. 315.

Pledge—Continued.

The holder of stock wrongfully pledged has a right to such stock until his lien is paid. *Id.*

The owner of stock unlawfully pledged may demand that the holder dispose of other securities to satisfy his lien before resorting to the sale of his stock. *Id.*

The stock must be sold, if at all, in strict accordance with the law. *Id.*

Failure to so sell, amounts to conversion for which an action will lie. *Id.*

Plumber ; See Constitutional Law.

Chapter 602, Laws 1892, in relation to the examination and registration of employing master plumbers, is constitutional.

People ex rel. Nechamcus v. Warden of City Prison, 144 N. Y. 529.

Police.

Chapter 182 of 1894, fixing grade and compensation of policemen of a city of over 800,000 inhabitants, considered.

Stack v. City of Brooklyn, 150 N. Y. 335.

Compensation of policemen in Brooklyn is regulated by the charter. *Id.*

The police commissioners of New York city have discretion to grant the application of a member of the force, who has served for 20 years, to be retired. *Brady v. Martin*, 145 N. Y. 253.

Where charges against the officer are preferred immediately after his application, the board has the right to examine such charges before acting on the application. *Id.*

What is essential to jurisdiction of police commissioners of New York city to remove a member of the force.

People ex rel. Jordon v. Martin, 152 N. Y. 311.

An admission of guilt, made after being sworn, and after having requested an adjournment to procure witnesses, is not a voluntary admission which will waive a proper notice of trial. *Id.*

When the return of a writ of *certiorari* states two dates, one definitely and one indefinitely, the former will control. *Id.*

The granting or withholding of a pension is discretionary with the commissioners, and not reviewable by any tribunal.

People ex rel. Bliel v. Martin, 131 N. Y. 196.

Police Court ; See Criminal Law.

A police justice of Rochester has jurisdiction over proceedings for disorderly conduct.

People ex rel. Lichtenstein v. Hodgson, affirmed, 126 N. Y. 647.

Police Power ; See Constitutional Law.

Poor.

An order requiring a relative to pay a certain sum a week for the support of a poor person, is not *res adjudicata* in an action upon such order to show that it had been terminated by the discharge from the poor-house of such person followed by subsequent self-support. *Aldridge v. Walker*, 151 N. Y. 527.

What a relative of an alleged poor person cannot be held liable for. *Id.*

In the discharge of a poor person from the poor-house terminates the requirement of the payment of a weekly sum. *Id.*

When the common council of a city exercises its discretion in the amount appropriated for indigent veterans, a further appropriation cannot be compelled.

People ex rel. Crammond v. Common Council, etc., of Rome, 136 N. Y. 489.

Power of Attorney ; See Agency ; Practice.

Powers.

A provision in a will directing the executors to distribute a portion of the property according to the provisions of the will of the person from whom testator obtained it, by delivering it to the executors of said will, is not an exercise of a power of disposition granted by the former will, but is a renunciation of such power. *Matter of Langdon*, 153 N. Y. 6.

A judicial settlement of administrators is conclusive upon the sureties upon their bonds. *Altman v. Hofeller*, 152 N. Y. 498.

Where trustees are given the power to convey a fee, they may, after sale of life estate under foreclosure, convey the remainder for a full consideration.

Dyett v. Central Trust Co., 140 N. Y. 54.

Unless its execution or non-execution depends upon the will of the grantee, every trust power is imperative.

Smith v. Floyd, 140 N. Y. 337.

Unless a power, not coupled with any trust, is exercised, no right is created. *Towler v. Towler*, 142 N. Y. 371.

Where grantees have a life estate with power to convey the same, and also power to a lien by will in fee, they can convey a fee to a purchaser by their warranty deed.

Hume v. Randall, 141 N. Y. 499.

Where a will empowers the executors to sell the real estate when in their judgment they deem it for the best interests of the estate, they are entitled to reimburse themselves for debts paid by them in excess of the personal estate.

Matter of Bolton, 146 N. Y. 257.

The execution of a testamentary power of sale will not be enjoined

Powers—Continued.

where the election to take the land as such is not concurred in by all of the beneficiaries.

McDonald v. O'Hara, 144 N. Y. 566.

A general power of appointment in the future is not void because the donee may create an illegal estate.

Hillen v. Iselin, 144 N. Y. 365.

An appointment of an estate by the donee of a power to appoint by will is invalid so far as it transcends the power. *Id.*

An execution of such a power will not be defeated because of some provision in excess of the power which can be eliminated without disturbing the general scheme of the appointment. *Id.*

Under a power to appoint to the donee's "child or children, or his, her or their descendant or descendants," appointment to the donee's son for life with remainder to his children is valid. *Id.*

A provision of a will that in case of the death of the beneficiary before a certain time the bequests should be "delivered to or disposed of" as testator's son and daughter should request and direct, and the proceeds paid to persons named, does not confer a power of appointment on such son and daughter.

Montignani v. Blade, 145 N. Y. 111.

Must designate some person other than grantee as its object.

Tilden v. Green, 130 N. Y. 29.

Must be for the sole benefit of such beneficiary. *Id.*

An invalid trust cannot operate as a power. *Id.*

To render a power in trust valid, the same certainty as to beneficiary must exist as in the case of a trust. *Id.*

The power of selection must be definite as to the objects. *Id.*

The exercise of powers attending a valid trust may be discretionary. *Id.*

The rule as to powers created by will are substantially applicable to real and personal property. *Id.*

The bestowal of discretionary power upon executors to convey or not to convey is opposed to the theory of an executory devise. *Id.*

The rule that a will of real estate shall not operate as an execution of a power, unless it is so intended, applies to a will of personal property.

N. Y. Life Ins. and Trust Co. v. Livingston, 133 N. Y. 125.

While the interest of a beneficiary rests upon execution of power, the title is acquired under the instrument creating the power.

Matter of Stewart, 131 N. Y. 274.

Exercise of power of appointment may be compelled. *Id.*

Until the power was exercised no one could maintain that he was entitled to any of the fund. *Id.*

Under a power to dispose of all her lands and rights therein, choate or inchoate, the inchoate rights of dower may be released.

Wronkow v. Oakley, 133 N. Y. 505.

Powers—Continued.

Where the will gives a power of sale as to unproductive property, but fails to do so as to the productive real estate, the executors have such power as to all the property when necessary to carry out the directions of the will to divide the property into shares. *Corse v. Chapman*, 153 N. Y. 466.

It seems that where, after a devise to testator's widow and children, a power of sale was given to the executor to sell the property and divide the proceeds, the devisees could elect to take the land freed from the power of sale prior to its execution. *Mellen v. Mellen*, 139 N. Y. 210.

It seems that the threatened execution of the power under such circumstances would be ground for an action to enjoin the sale. *Id.*

There is no repugnancy between a devise in fee and a subsequent power of sale. *Id.*

The lapse of three years after the devisees had taken possession, together with a lease of the property, *held*, not inconsistent with the continued existence of the power of sale. *Id.*

Power in trust to executors to sell lands applies to real property which the testator had contracted to sell in his lifetime. *Id.*

Holly v. Hirsch, 135 N. Y. 590.

To create a valid power, the objects to be benefitted shall be specified in, or be clearly ascertainable from, the instrument. *Sweeney v. Warren*, 127 N. Y. 426.

Where an attempted power of sale in a will discloses no purpose to be accomplished, nor any person to be benefitted, a valid power in trust is not created by it. *Id.*

Although a power may be vested in executors as such to be exercised for their own benefit as individuals, it will be construed as being executed in the interest of the estate and not for their own benefit. *Id.*

Where a will gives the executors power to sell lands and to partition to pay debts, the authority to partition cannot be exercised until after the payment of all the debts. *Drake v. Paige*, 127 N. Y. 562.

Practice; *See Appeal; Certiorari; Costs; Criminal Law; Equity; Error; Executions and Supplementary Proceedings; Judgment; Jury; Justice's Court; New Trials; Reference; Service of Process; Stay; Stipulations; Submission of Controversy.*

I. SUMMONS AND COMPLAINT.

II. APPEARANCE.

III. DISCONTINUANCES.

IV. STAY OF PROCEEDINGS.

V. DEPOSITION.

Practice—Continued.**VI. MOTIONS AND ORDERS.****VII. TRIAL.**

1. *Rights to Jury Trial.*
2. *Conduct of Trial.*
3. *Variance between Proof and Pleading.*
4. *Question for Court and Jury.*
5. *Charge.*
6. *Directing Verdict.*
7. *Verdict.*
8. *Trial by Court.*

I. SUMMONS AND COMPLAINT.

A person claiming in hostility to a will cannot maintain an action under section 2653 of the Code.

Lewis v. Cook, 150 N. Y. 163.

What does not constitute a reformation of a contract, and what amendment of pleading did not change the claim from a legal to an equitable one, in convention of section 723 of the Code.

Nichols v. Scranton Steel Co., 137 N. Y. 471.

The power of the court to allow amendment of the pleadings so as to set up a cause of action barred by the Statute of Limitations should rarely be exercised, but an action upon account may be substituted for an action of an account stated under certain circumstances.

Eggleston v. Beach, 128 N. Y. 592.

Where the effect would be to change the nature of the action, a motion to amend pleading to conform to proof was properly denied.

Freeman v. Grant, 132 N. Y. 22.

Unless under peculiar and extraordinary circumstances, an objection that a party was not served with process and that an appearance by an attorney for him was unauthorized cannot be taken in a collateral proceeding.

Washbon v. Cope, 144 N. Y. 287.

The referee, under Code Civil Procedure (§§ 723, 1018), may amend the summons and complaint, and add an additional party.

Magovern v. Robertson, 127 N. Y. 691.

The words "rule of limitation," as used in section 414 of the Code, construed.

Hayden v. Pierce, 144 N. Y. 512.

II. APPEARANCE.

In an action against non-residents served by publication the courts of this state acquire jurisdiction of the defendants by a general appearance by attorney.

Reed v. Chilson, 142 N. Y. 152.

Where a party does not intend to submit himself to the jurisdiction of the court, he must appear specially for the purpose of raising that question by motion.

Id.

He may allow judgment to be taken by default without affecting

Practice—Continued.

his rights, since no judgment entered without service of process in some form could bind the defendant. *Id.*

The question of jurisdiction would protect defendant at any stage of proceedings for enforcement of judgment, provided it has not been waived by his own act. *Id.*

III. DISCONTINUANCE.

A person interested in the prosecution of an action may resist its discontinuance. *Matter of Lasak*, 131 N. Y. 624.

Where plaintiff has right to sue one or more joint wrong-doers, he may discontinue as to any one or all as he may elect.

Dyett v. Hyman, 129 N. Y. 351.

IV. STAY OF PROCEEDINGS.

Section 613 does not apply to a temporary stay pending a motion in an ordinary action. *Carter v. Hodge*, 150 N. Y. 532.

V. DEPOSITION.

Where sufficient grounds exist to frame a pleading an order of examination is unnecessary.

Govin v. De Miranda, 133 N. Y. 574.

Physical examination cannot be had in advance of trial for personal injuries.

McQuigan v. Delaware, Lackawanna, etc., R. R., 129 N. Y. 50.

An order for a mere physical examination independent of an order for examination as a witness or a party before trial.

Lyon v. Manhattan Ry. Co., 142 N. Y. 298.

The referee before whom such examination is had may administer an oath, take plaintiff's testimony, and the party is bound to appear and answer all proper questions. *Id.*

Examination of defendant before trial should not be granted to procure the production of books and correspondence.

El Tazi v. Stein, appeal dismissed without opinion, 126 N. Y. 642.

A party to an action may perpetuate his own testimony by an examination before trial.

Farmers' Loan & Trust Co. v. Siefke, 144 N. Y. 354.

A party has no standing to insist upon the benefit of an order which has, by a judgment procured by him, been declared void.

Matter of New York, Lackawanna, etc., R. R. Co., 126 N. Y. 632.

Where defendant's wife claimed that plaintiff and her husband were in collusion to deprive her of her rights, an order for their examination to enable her to frame her answer should be granted. *Howe v. Learey*, 131 N. Y. 645.

A motion to set aside service of summons and complaint was

Practice—Continued.

properly denied since proceedings for removal to United States Court by foreign insurance company gave court jurisdiction.

Farmer v. Nat. Life Assn., 138 N. Y. 265.

An order made on petition authorized by statute is conclusive as to the parties before the court, and can only be reviewed upon appeal.

Culross v. Gibbons, 130 N. Y. 447.

Where the examination is essential to the bringing and prosecution of the action, an order of examination will be granted.

Fatman v. Fatman, 133 N. Y. 674.

It is not necessary that the affidavit should state a complete cause of action.

Id.

Where the examination is to be taken before a judge, its scope should not be limited.

Id.

VI. MOTIONS AND ORDERS.

A discovery will not be ordered where a subpoena *duces tecum* is sufficient.

Dalzell v. Fahy's Watch Case Co., 141 N. Y. 570.

The rights of parties are fixed by the actual order and not from time of entry.

Robinson v. Govers, 138 N. Y. 425.

A judge out of court may make an order to show a cause shortening the usual notice to be given.

Matter of Argus Co., 138 N. Y. 557.

It seems that Rule 38 of the General Rules of Practice, providing that contested motions shall not be noticed or brought to a hearing at any Special Term held at the same time and place within a circuit, refers only to those incidental applications, ordinarily denominated motions, which are made during the progress of an action or special proceeding.

Id.

When the rule does not deprive a judge holding a Special Term and circuit of the power of entertaining a motion noticed for such term.

Id.

Power of trial court to make an order correcting a judgment so as to award each party the costs as adjusted after judgment was reversed on appeal considered.

Genet v. Delaware & Hudson Canal Co., 136 N. Y. 217.

After verdict and before entry of judgment a motion may be made at Special Term to charge a receiver with costs personally.

Bourdon v. Martin, 142 N. Y. 669.

VII. TRIAL.**1. Right to Jury Trial.**

Where plaintiff in action for malicious prosecution tried at Special Term could not be heard, on appeal, to object to the want of a jury.

Stono v. Weiller, 128 N. Y. 655.

Equitable issues are triable by a jury in the discretion of the court.

Shepard v. Manhattan Ry. Co., 131 N. Y. 215.

Practice—Continued.

An order granting defendant as of right a trial by jury of such issues will be reversed. *Id.*

Where equitable relief is alleged but defendants claim a trial by jury of any issue of fact, the demand should be made before trial. *Lynch v. Met. Elevated Ry. Co.*, 129 N. Y. 274.

Where a demand for past damages is made in a prayer for an injunction, equity may retain jurisdiction to close up all matters in dispute. *Id.*

2. Conduct of Trial.

When reading of law by counsel ought not to be permitted.

Williams v. Brooklyn Elevated R. R. Co., 126 N. Y. 96.

A postponement of a trial for murder is properly denied where it is not asked on the ground of absence of witnesses.

People v. Shea, 147 N. Y. 78.

What does not constitute the separation of the jury within the meaning of chapter 465 of the Code of Criminal Procedure.

People v. Hoch, 150 N. Y. 291.

An answer to the hypothetical question as to the mental condition of defendant at the time of the crime that witness did not believe him responsible for his acts may be stricken out.

People v. Tuzckewitz, 149 N. Y. 240.

Party must specify with reasonable clearness the point that he desires considered in order to predicate error upon an exception to the ruling against him.

Stouter v. Manhattan Ry. Co., 127 N. Y. 661.

This rule should always be applied when the defect is not so radical as to be incapable of being remedied. *Id.*

When a formal exception need not be taken.

Mitchell v. Turner, 149 N. Y. 39.

A certificate of acknowledgment when read at trial makes out a *prima facie* case.

Albany County Savings Bk. v. McCarty, 149 N. Y. 71.

An objection to the competency of witnesses need only be taken once. *Carlson v. Winterson*, 147 N. Y. 652.

When the right to object to evidence is waived.

Brady v. Nally, 151 N. Y. 258.

Whether or not a new trial shall be granted in a criminal case on the ground of a separation of the jurors after the case was submitted to them, rests in the discretion of the trial court.

People v. Buchanan, 145 N. Y. 1.

Where an indictment for homicide contains two counts and the district attorney elects, after all the evidence is in, to go to the jury on the second count a refusal to strike out all evidence on the subject of the first is proper. *Id.*

Communications made to a friend or to an attorney in the presence of a friend are not privileged under section 835 of the Code. *Id.*

Practice—Continued.

Compelling a defendant in a criminal case to stand up for identification by a witness is not a violation of his constitutional right not to be compelled to be witness against himself.

People v. Gardner, 144 N. Y. 119.

Mere inspection of document produced upon notice does not entitle it to be put in evidence. *Smith v. Rentz*, 131 N. Y. 169.

Incompetent evidence received without objection may be subsequently stricken out. *Matter of Lasak*, 131 N. Y. 624.

Counsel's address to jury must relate only to questions in case; otherwise, where ground for reversal, judge presiding at trial may control counsel.

Williams v. Brooklyn Elevated R. R. Co., 126 N. Y. 96.

When counsel undertakes to read the law to the jury, the judge may properly interpose to prevent it; and if law is correctly stated it is no ground for reversal. *Id.*

Where there is no evidence to support one of two facts, an exception to both is too broad to raise a question as to the other.

Moore v. N. Y. Elevated R. R. Co., 130 N. Y. 523.

Where a juror in a trial for murder stated he had formed an opinion, but notwithstanding "thought" he could render an impartial verdict according to the evidence, *held*, sufficient under Code Criminal Procedure (§ 376).

People v. Martell, 138 N. Y. 595.

The trial court may refuse to compel the prosecution to elect whether they will proceed under a count charging deliberate and premeditated murder, or another.

People v. Wright, 136 N. Y. 625.

It seems that a peremptory challenge cannot be interposed in a criminal case after the juror has been sworn.

People v. Hughes, 137 N. Y. 29.

An objection, however, to the court permitting such challenge, conceding the power of the court but objecting to the exercise of its discretion upon disclosed grounds, is not sufficient to raise on appeal the objection of want of. *Id.*

Upon a criminal trial, the prosecution may be permitted to reserve its right to peremptory challenge in each case until after the challenges on both sides for actual bias have been disposed of.

People v. McGonegal, 136 N. Y. 62.

When juror possessing opinion is not disqualified as matter of law. *Id.*

The people are not required to go through the entire list of individual challenges and determine whether they will avail themselves of all of them before the defendant can be required to make a challenge upon any ground. *Id.*

In ordinary practice the challenges for cause may be grouped. *Id.*

Where the challenge for bias is improperly overruled, the exclu-

Practice—Continued.

- sion of the juror, upon a peremptory challenge, does not affect the tenability of the exception. *Id.*
- A question which does not seek to substitute the opinion of the witness for the judgment of the jury is permissible. *Mortimer v. Manhattan Ry. Co.*, 129 N. Y. 81.
- An objection that the question is not within the competency of any witness challenges the competency of all witnesses on that subject. *Jefferson v. N. Y. Elevated R. R. Co.*, 132 N. Y. 483.
- Refusal to postpone a trial rests in the discretion of the court. *Paine v. Aldrich*, 133 N. Y. 544.
- The attention of a witness may be called to his testimony before the grand jury. *People v. Sherman*, 133 N. Y. 349.
- Where the complaint is verified, plaintiff is not bound to accept unverified answer. *Rogers v. Decker*, 131 N. Y. 490.
- It is too late to interpose an objection after an answer has been made to a question, the remedy being to move to strike out the evidence. *Link v. Sheldon*, 136 N. Y. 1.
- On the separate trial of a person jointly indicted with another for homicide, it is not error to bring the latter into court and let him be identified by a witness. *People v. Wilson*, 141 N. Y. 185.
- It is competent for the court to strike out evidence previously admitted on its own motion. *Id.*
- An extra allowance under section 3372 of the Code, should not be granted in proceedings under a special act, but costs in such an action are governed by section 3240. *Matter of City of Brooklyn*, 148 N. Y. 107.
- Where testimony is not, in its essential nature, incompetent, all grounds of objection which may be obviated if they are specifically stated must be deemed waived by failure to specify them. *People v. Murphy*, 135 N. Y. 450.
- So, *held*, of the objection that a certain document being only collaterally in issue could not be established by comparison with other writings offered in evidence. *Id.*
- The fact that a plaintiff called a witness does not absolutely conclude him by an opinion of such witness, as to the effect of smoke from an engine upon the plaintiff's vision. *McNamara v. N. Y. Central, etc., R. R. Co.*, 136 N. Y. 650.
- What subsequent acts amount to a denial of a motion for nonsuit or a waiver of a decision upon it. *Burt v. Oneida Community*, 137 N. Y. 346.
- A party desiring to claim that facts offered to be proved are not warranted by the pleadings and the issues made by them, must in some way at the trial object to the proof as incompetent under the pleadings. *Niebuhr v. Schreyer*, 135 N. Y. 614.
- Unless the testimony of the juror fails to meet the statutory re-

Practice—Continued.

- quirements, the decision of the trial court in favor of his competency is conclusive in the Court of Appeals. *Id.*
- An impersonal prejudice on the part of a juror against persons guilty of the crime with which the defendant is charged will not, as matter of law, disqualify him. *Id.*
- When, if party is not satisfied with the findings of fact on a trial, he should move for a new trial and proceed to review the action of the jury under Code Civil Procedure (§ 1003).
First Nat. Bk. of Chicago v. Dean, 137 N. Y. 110.
- Observation of the trial judge in excluding evidence, *held*, not erroneous. *People v. Webster*, 139 N. Y. 73.
- A charge that no wrong done by deceased to defendant's wife was justification, but that if he had been informed and believed a wrong had been done, this might be considered in determining motive and intent, *held*, no error. *Id.*
- Where it was stipulated that the peremptory challenges of jurors should be determined before they left the witness stand, the entering of a juror in the jury box without objection is not objectionable. *People v. Miles*, 143 N. Y. 383.
- Matter which is improper or irresponsive to an inquiry may be stricken out on motion. *Holmes v. Roper*, 141 N. Y. 64.
- Where a party has failed to move for the striking out of such evidence, its presence will not be the ground for reversal on appeal. *Id.*
- Where defendant in a criminal trial interposes a general plea of not guilty, and a special plea of former connection, there need be but one jury used. *People v. Connor*, 142 N. Y. 130.
- Rules of evidence in civil cases are also applicable in criminal cases unless otherwise provided by law.
Van Bokkelen v. Berdell, 130 N. Y. 141.
- It is not requisite to establish the absolute certainty of the existence of facts in issue.
Gallagher v. Crooks, 132 N. Y. 338.
- At the close of plaintiff's case the court may entertain an objection based upon the insufficiency of the complaint.
Weeks v. O'Brien, 141 N. Y. 199.
- But the defendant cannot insist upon a dismissal of the complaint where he has elicited upon cross-examination testimony which cures the alleged defect. *Id.*
- Upon a motion in arrest of judgment in a criminal case, the only objections which defendant can take are to the jurisdiction of the court and that the facts stated do not constitute a crime.
People v. Meakim, 133 N. Y. 214.
- An improper statement does not impose upon the court the absolute duty of discharging the jury.
Chesebrough v. Conover, 140 N. Y. 382.
- Where a person denies the conversation with a third person with

Practice—Continued.

- which he is charged, it is competent to call such third person to testify to the fact. *Id.*
- Where the proof failed to show that the town mentioned in the indictment was in the county specified, the court will take judicial notice that it is. *People v. Wood*, 131 N. Y. 617.
- Failure of defendant's counsel to cross examine rejected juror is no ground for reversal. *Id.*
- No error to reject jurors who have conscientious scruples against rendering a verdict in a capital case. *Id.*
- Comments of the court in a criminal case in excluding testimony offered on behalf of the defendant of a derogatory nature to the witness, is error. *People v. Wood*, 126 N. Y. 249.
- Error in the exclusion of evidence offered by a defendant in a criminal case for the purpose of showing insanity is not cured by the subsequent admission of other evidence. *Id.*
- Ruling that the privilege against disclosure of confidential communications is that of the witness and not the party objecting, thus forcing the witness to decline to answer, is erroneous. *Id.*
- The committing of a witness for defendant to jail in the presence of the jury because of the character of his evidence is within the discretion of the judge. *People v. Hayes*, 140 N. Y. 484.
- A stipulation to read evidence taken in a former trial binds the parties to read the whole of such evidence. *Id.*
- The reading of such evidence is subject to all legal objections. *Id.*
- The reading of a portion of the executor's testimony taken in a designated proceeding only permits the reading of such other parts as tend to explain the portions offered in evidence. *Matter of Chamberlain*, 140 N. Y. 390.
- The trial court may use its discretion in limiting the range of inquiry of counsel. *Gillett v. Whiting*, 141 N. Y. 71.
- The people may rest on giving proof of the offense of destroying property without proving the intention charged. *People v. Kane*, 131 N. Y. 111.
- The accused may give evidence in proof of justification of his act. *Id.*
- Whether a willful destruction was unlawful may be question for the jury. *Id.*
- Where the main relief sought was an injunction and the award of damages for past injuries merely incidental to the main relief, a demand that the two be severed will be denied. *Hunter v. Manhattan Ry. Co.*, 141 N. Y. 281.
- Where no objection is made to omission to enter a formal judgment in a prior issue, the omission is not sufficient ground for acquittal. *People v. Trimble*, 131 N. Y. 118.
- Order made at close of first trial and allowing defendant to answer over was a judgment entered on the verdict. *Id.*

Practice—Continued.**3. Variance between Proof and Pleading.**

There is not a variance between complaint alleging money indebtedness and proof that defendant agreed to pay in specific articles.

New York News Pub. Co. v. National Steamship Co., 148 N. Y. 39.

Complaint may be dismissed where variance exists between pleading and proof. *Gallaudet v. Kellogg*, 133 N. Y. 671.

It seems that the Statute of Frauds merely introduces a new rule of evidence and does not make a contract not complying with it illegal. *Crane v. Powell*, 139 N. Y. 379.

In a criminal case the evidence should be presented to the jury so that they may appreciate its character and weight and determine its credibility. *People v. Fanning*, 131 N. Y. 659.

He should not refrain from a just and accurate presentation because it may be regarded as bearing against the accused. *Id.*

Where the complaint demanded only equitable relief, and the action was tried as an equitable one, *held*, that on a failure to make out an equitable cause of action a refusal to award legal relief was proper. *Hawes v. Dobbs*, 137 N. Y. 465.

So *held* in an action brought to charge real estate under an agreement to protect a grantee and mortgage of real estate subject to mortgage whose interests were subsequently cut off by foreclosure. *Id.*

An objection contained in the answer, though not adduced by defendant against testimony given on trial, may be raised on the pleading. *Reed v. McConnell*, 133 N. Y. 425.

Where the deceased was killed when actually engaged in work in an excavation, the inference may be drawn that the excavation was the place furnished by the master to work in.

Stuber v. McEntee, 142 N. Y. 200.

4. Questions for Court and Jury.

Where the servant had knowledge of the condition of the place where he worked, it is error to submit that question to the jury.

Kennedy v. Manhattan Ry. Co., 145 N. Y. 288.

Upon a second trial of special issues, the jury may return findings contrary to those of a former jury where the matters are within the scope of the inquiry upon the second trial but are not made the basis of any relief. *Dunkel v. Dunkel*, 141 N. Y. 427.

It is proper to submit a question of fact where the existence of such fact is manifest from undisputed testimony.

Robbins v. Springfield Fire & Marine Ins. Co., 148 N. Y. 477.

On a trial of an indictment for forgery in the second degree, it is error to refuse to submit question of intent to jury.

People v. Wiman, 149 N. Y. 29.

Error in withholding from the jury question of fact is not cured

Practice—Continued.

by the fact that charge contains statement susceptible of a construction as would enable jury to consider some elements of excluded question.

Corn Exchange Bk. v. American Dock & Trust Co., 149 N. Y. 174.

A party is not precluded by his request for the direction of a verdict from moving to go to the jury on questions of fact.

Shultes v. Sickles, 147 N. Y. 704.

A mere surmise that there may have been negligence is not sufficient to justify a submission of the question to the jury.

Morris v. L. S. & M. S. R. Co., 148 N. Y. 182.

The submission of the question of the authority of the president of a company to make and execute a deed, and the submission by the court of the question of mistake, does not constitute a mistrial in an action of ejectment in which it is claimed there was a mistake in the deed.

De Forest v. Walters, 153 N. Y. 229.

When questions of fact should not be submitted to jury.

Cadwell v. Arnheim, 152 N. Y. 182.

When both parties move for the direction of a verdict they waive their right to have any questions of fact submitted to the jury.

Clason v. Baldwin, 152 N. Y. 204.

Where the evidence tended to show negligence on part of defendant, the question should be submitted to the jury.

Richardson v. N. Y. Central, etc., R. R. Co., 133 N. Y. 563.

Where the testimony of a party in his own favor conflicts with the terms of a written instrument made by him, the question is for the jury.

U. S. Nat. Bank v. Ewing, 131 N. Y. 506.

Question of what constitutes due diligence in the prosecution of a claim, where it arises upon undisputed evidence, may be one of fact.

Salt Springs Nat. Bk. v. Sloan, 135 N. Y. 371.

It seems that the rule is the same upon questions of negligence and of probable cause.

Id.

What is reasonable time after notice of termination of obligation is generally a question of law.

Reilly v. Dodge, 131 N. Y. 153.

Where the facts and references are doubtful it may be submitted to the jury.

Id.

Where a party meets burden of proof with his own testimony, the jury may determine as to its credibility.

Joy v. Diefendorf, 130 N. Y. 6.

The construction of a disputed written instrument as to its character is for the jury.

Govin v. De Miranda, 140 N. Y. 662.

Where the evidence is contradictory it should all be submitted to the jury.

Robbins v. Robbins, 133 N. Y. 597.

Where there is a difference of opinion between experts a question is properly left to the jury.

Keane v. Village of Waterford, 130 N. Y. 188.

Practice—Continued.

Where it appeared that the mail crane, which injured a brakeman while climbing the side of a car, was similar to those used at other points, a submission of the question of defendant's negligence in its location was error.

Sisco v. Lehigh & Hudson River R. Co., 145 N. Y. 296.

Where a contract was in writing and not ambiguous or equivocal it is not competent to ask the jury to determine its construction.

Wyllie v. Palmer, 137 N. Y. 248.

In a criminal case it is error for court to exclude corroborative evidence of defendant's testimony and subsequently submit question of defendant's credibility to jury.

People v. Barberi, 149 N. Y. 256.

What constitutes a reasonable time in withholding the prosecution of a suit is a mixed question of law and fact.

Traders' Nat. Bank v. Parker, 130 N. Y. 415.

Plaintiff does not waive his right to sue after expiration of a reasonable time.

Id.

Where not the facts, but the inferences drawn therefrom, are in dispute, the case should be submitted to the jury.

Lane v. Town of Hancock, 142 N. Y. 510.

Where the plaintiff is unable to sustain the burden of proof, a new trial or nonsuit may be directed.

Id.

5. Charge.

It is not error to charge that one hiring a wharf is not relieved from examining it by a statement that it is all right.

Vroman v. Rogers, 132 N. Y. 167.

When refusal to charge that there is no evidence justifying a finding that the condition of plaintiff was attributable to the injury is erroneous. *Saumby v. City of Rochester*, 145 N.Y. 81.

It is error to charge so as to not clearly state the rule in relation to the consideration of defendant's intoxication on the question of motive.

People v. Corey, 148 N. Y. 476.

A refusal to charge propositions which would set up an unsafe and inaccurate standard by which to guide the judgment is not erroneous.

People v. Johnson, 140 N.Y. 350.

An improper reference of counsel to jury is cured when court orders objectionable words stricken out and charges jury on that point.

People v. Hoch, 150 N. Y. 291.

When defendant cannot complain of an instruction that words claimed to be libelous have only the milder of the two meanings.

Mattice v. Wilcox, 149 N. Y. 624.

In action for injuries alleged to have been caused by acts of defendant in frightening plaintiff's horse, defendant is entitled to have jury charged that no recovery could be had without proof of frightening of the horse was the cause of the accident.

Mitchell v. Turner, 149 N. Y. 39.

Practice—Continued.

The judge may use such language as he deems fit so long as he states the true legal rule. *Id.*

A charge as to definition of "reasonable doubt" *held* proper.

People v. Barker, 153 N. Y. 111.

It is not error for the court to refuse to charge in the language of an elementary writer, provided the charge, as given, covers the points raised in the case.

People v. Wayman, 128 N. Y. 585.

Charge in criminal case as to nature of reasonable doubt, sustained.

People v. Hughes, 137 N. Y. 29.

Where it appears that the libelous article was published hastily, and that no inquiry as to the truth of the charges was made, the court is justified in charging that the publication was made wantonly, recklessly, etc.

Turton v. New York Recorder Co., 144 N. Y. 144.

It is within the power of the court, when the counsel of the parties are present, to recall the jury after its retirement and further charge.

Phillips v. N. Y. Central, etc., R. R. Co., 127 N. Y. 657.

The practice of seizing upon detached portions of disputed evidence and requiring a conditional charge that, if a certain portion of such evidence is believed, the verdict should be in accordance therewith, is not to be commended.

Holcomb v. Town of Champion, affirmed on opinion, 128 N. Y. 599.

Issue was one of estoppel only. It is not prejudicial error to refuse to charge that there was no inconsistency between plaintiff's attempt to enforce it against other parties.

Stillings v. Haggerty, affirmed without opinion, 126 N. Y. 638.

The jury may properly be instructed on the whole case that the plaintiff is bound to establish the fact by a preponderance of evidence, when he only makes one *prima facie* case.

Farmers' Loan & Trust Co. v. Siefke, 144 N. Y. 354.

Charge that, if plaintiff willfully violated the rule prohibiting passengers from riding on the step when the car was in motion, he could not recover, was properly refused where there was no evidence of willful violation.

Medler v. Atlantic Ave. R. R. Co., affirmed without opinion in 126 N. Y. 669.

An error must be cured by subsequent instructions clearly put.

Whitten v. Fitzwater, 129 N. Y. 626.

An exception to a charge fairly made regarding defendant's character is not available for reversal.

People v. Brooks, 131 N. Y. 321.

Erroneous instructions can be effectually cured only by their withdrawal in terms explicit, and unequivocal.

Phillips v. N. Y. Central, etc., R. R. Co., 127 N. Y. 657.

Practice—Continued.

Subsequent charge by judge with the request of counsel must be assumed to instruct the jury as effectually as if the court had not previously declined. *Id.*

It is not error to charge that good character is of no avail where a crime is proved beyond doubt.

People v. Sweeney, 133 N. Y. 609.

Reading to the jury by the judge of extracts from a reported case, laying down legal principles, furnishes no ground for exception.

People v. Minnaugh, 131 N. Y. 563.

Upon the trial of an indictment for murder, refusal of the judge to further instruct the jury after they had retired a second time as defendant's counsel was absent, *held*, not to be a violation of the requirement of Code Criminal Procedure (§ 427).

People v. Parker, 137 N. Y. 535.

Where a particular request to charge in a criminal case has been fully covered in the charge as delivered, the refusal of the court to again charge it specifically is discretionary.

People v. Harris, 136 N. Y. 423.

A charge that a fact is of no consequence, followed by a statement that it might be considered, is not sufficient for reversal.

Embler v. Town of Wallkill, 132 N. Y. 222.

Where a portion of a charge excepted to is correct in part and no qualification is suggested, a general exception cannot be sustained.

Wells v. Higgins, 132 N. Y. 459.

It is not ground for reversal to charge that good character can be considered as to whether defendant is telling the truth.

People v. Formosa, 131 N. Y. 478.

It is not error to allow jury to take the instrument on which the prosecution is founded. *Id.*

A charge that there is no presumption to be taken against a defendant because he does not take the witness stand is not erroneous.

People v. Hayes, 140 N. Y. 484.

The court is not bound to put a proposition as formulated by counsel.

Crosby v. Delaware and Hudson Canal Co., 141 N. Y. 589.

Where the evident meaning of the judge's charge was in harmony with the context, it cannot be construed alone.

Randall v. Packard, 142 N. Y. 47.

After both parties have made requests to charge, the first party cannot be again heard to present further charges.

O'Neil v. Dry Dock, East Broadway, etc., R. R. Co., 129 N. Y. 125.

A counsel cannot unreasonably prolong a trial. *Id.*

6. Directing Verdict.

Where there is no evidence upon an issue, or the weight of evi-

Practice—Continued.

dence so preponderates that a verdict against it would be set aside, it is the duty of the court to nonsuit.

Hemmens v. Nelson, 138 N. Y. 517.

Circumstances under which it is the duty of the trial judge to nonsuit or direct a verdict.

Linkauf v. Lombard, 137 N. Y. 417.

When a fact should be deemed conclusively established, and should not be submitted to the jury.

Page v. Krekey, 137 N. Y. 307.

What does not constitute a nonsuit, but a dismissal on the merits.

Bliven v. Robinson, 152 N. Y. 333.

Where a complaint is dismissed upon the plaintiff's own showing, it should not be "upon the merits."

Knight v. Sacketts & Wilhelms Lithographing Co., 141 N. Y. 404.

Where the facts, if decided in his favor, would entitle a party to recover, the complaint should not be dismissed.

Pratt v. Dwelling House Mut. Fire Ins. Co., 130 N. Y. 206.

Where an exception is taken to a nonsuit, it is not necessary to request that all or one particular question be submitted to the jury. *Id.*

A motion for a nonsuit or to dismiss the complaint must specify the defects supposed to exist to be effectual.

Quinlan v. Welch, 141 N. Y. 158.

Motion to dismiss the complaint are usually ineffectual unless the grounds upon which it is based are specified.

Gerding v. Haskin, 141 N. Y. 514.

When nonsuit is granted, and hearing proceeds, judgment rendered in favor of defendant is to be considered as upon the merits.

Columbia Bk. v. Gospel Tabernacle Church, 127 N. Y. 361.

The judgment being in form upon the merits, plaintiff should have moved to set the same aside for irregularity. *Id.*

Where plaintiffs conceded the issue was one of fact, but both parties asked the court to direct a verdict, it is no error for the court to do so. *Reck v. Phenix Ins. Co.*, 130 N. Y. 160.

Upon appeal the question is whether the evidence supported the conclusions of fact made by the court. *Id.*

A refusal to find upon a question of fact when requested, or finding without any evidence to sustain it, is a ruling upon a question of law. *Van Bokkelen v. Berdell*, 130 N. Y. 141.

An exception to a ruling of law serves as notice of intention to raise the question of error. *Id.*

7. Verdict.

When a refusal to find a fact is not tantamount to a finding against it. *Galle v. Tode*, 148 N. Y. 270.

Practice—Continued.

Exception to a finding raises the question as to whether there was any evidence tending to support the finding.

Hughes v. Met. Elevated Ry. Co., 130 N. Y. 14.

Where no evidence exists to support a proposed finding the court should refuse the whole request.

Koehler v. Hughes, 148 N. Y. 507.

The Court of Appeals will not review the exercise of the discretion of the court below, which has the power to impose the costs in a proceeding for the distribution of surplus moneys.

Hyman v. Harff, 138 N. Y. 48.

In an action against an elevated railroad a refusal to find that the proximity of the station was a convenience to the tenants of the abutting premises, and that thousands of persons on the way to and from it passed plaintiff's store whereby the business was benefitted and the rental increased, *held*, no error.

Adler v. Metropolitan Elevated Ry. Co., 138 N. Y. 173.

8. Trial by Court.

In an equity action, where a question of fact covering the whole case is submitted to the jury, and the right to the equitable relief sought follows upon the adoption by the court of the findings of the jury, the court may at once, upon adoption of the finding, direct judgment without further trial. In such case the omission of the court to make findings of fact and law is an irregularity merely; the remedy of the defeated party, if he is entitled to any relief, is by motion, not by appeal.

Hooker v. City of Rochester, 126 N. Y. 635.

An action by a creditor to enforce a trust created by the debtor for the plaintiff's benefit for an accounting, and the application of the funds in the hands of defendant to the payment of the debt, is in equity and triable by court.

Pendergast v. Greenfield, 127 N. Y. 23.

The absence of the judge on a trial without a jury during the giving of testimony which was conceded by both parties will not require the setting aside of his judgment.

Crook v. Hamlin, 140 N. Y. 297.

The reading by the judge of evidence taken out of court may be dispensed with where the counsel agree or orally state to the judge what the evidence contains. *Id.*

Prescription ; *See Adverse Possession ; Highways.*

Presumption ; *See Evidence.*

Principal and Agent ; *See Agency.*

Principal and Surety ; *See Surety.*

Privacy.

The right of privacy dies with the person.

Schwylar v. Curtis, 147 N. Y. 434.

What rights the relatives have to protect the memory of deceased, considered. *Id.*

Private Way; *See Easements.*

Privileged Communications; *See Libel and Slander*; *Witness.*

Process; *See Arrest*; *Attachment*; *Execution*; *Habeas Corpus*; *Injunction*; *Practice.*

Prohibition, Writ of; *See Injunction.*

Promise; *See Bills and Notes*; *Statute of Frauds.*

What constitutes an absolute promise to pay a debt by one creditor of all the debtor's property.

Clark v. Howard, 150 N. Y. 232.

A creditor promising to pay debtor's debts may be sued by another creditor who was not privy to the contract or consideration. *Id.*

A making of a note by a debtor of a corporation, at the request of one of its officers, in order to raise money with which to pay the maker's debt to the corporation, furnishes no consideration for the promise by the officer individually to renew the note.

Arend v. Smith, 151 N. Y. 502.

Where a debtor transfers property to another in consideration of an agreement by the transferee to assume and pay the debt, such promise is not within the Statute of Frauds.

First Nat. Bk. of Sing Sing v. Chalmers, 144 N. Y. 432.

An oral promise to indemnify a person for becoming indorser on a note for a third person is not within the Statute of Frauds.

Jones v. Bacon, 145 N. Y. 446.

In order to entitle a stranger to a covenant to enforce it, it is essential that the relation of debtor and creditor shall exist between the grantor and such person.

Durnherr v. Rau, 135 N. Y. 219.

Promise of Marriage; *See Breach of Promise of Marriage.*

Promissory Notes; *See Bills and Notes.*

Public Lands; *See Title to Land.*

Public Parks; *See New York City.*

Public Schools; *See Schools.*

Purchase for Value; *See Bills and Notes; Chattel Mortgage; Recording Conveyances; Sales; Vendor and Purchaser.*

Q.

Quarantine; *See Health Law.*

Where certificate of U. S. consul as to character of shipper of rags is lacking, the cargo may be held for disinfection.

Lockwood v. Bartlett, 130 N. Y. 340.

Charges for disinfection collected by duress may be recovered.

Id.

Questions of Law and Fact; *See Practice.*

Quia Timet; *See Cloud on Title; Equity.*

Quo Warranto; *See Elections; Office.*

The judgment in a *quo warranto* proceeding to try the title of the respondent to an office cannot provide for the inducting of the relator into such office; *mandamus* is the proper remedy.

People ex rel. Sears v. Toby, 153 N. Y. 381.

R.

Racing Associations; *See Betting and Gaming.*

The rules of the jockey club permit it to exclude a person guilty of dishonest practices, and is not unreasonable.

Grannan v. Westchester Racing Ass'n, 153 N. Y. 449.

A decision of the jockey club ruling a person off the turf justifies the association in excluding such person from its grounds. *Id.*

The Civil Rights Act of 1895 confers no absolute right of admission to a public race meeting on the person who has been ruled off the turf.

Id.

Railroads; *See Carriers; Eminent Domain; Mechanic's Lien; Municipal Corporations; Negligence; Rapid Transit; Street Railroads.*

I. AS CORPORATIONS.

II. CONSTRUCTION.

(a) *Generally.*

(b) *Elevated Roads.*

III. OPERATION.

(a) *Duties to Passengers.*

(b) *Track, Ground, Fences, Highways.*

Railroads—Continued.(c) *Running of Trains.*(d) *Duties to Servants.*

IV. TOLL AND CHARGES.

V. MORTGAGES.

I. AS CORPORATIONS.

A railroad company is not subject to the provisions of Laws 1884 (chap. 252, § 12), as amended by Laws 1889 (chap. 531), requiring the approval of the railroad commissioners and the consent of abutting property owners, as it is within the saving clause of section 18.

Hudson River Telephone Co. v. Watervliet Turnpike & Ry. Co., 135 N. Y. 393.

When a street railroad may use streets other than those named in its articles of association.

Brooklyn Heights R. R. Co. v. City of Brooklyn, 152 N. Y. 244.

The Rapid Transit Acts do not contemplate nor permit a lease in perpetuity.

Sun Printing and Pub. Ass'n v. Mayor, 152 N. Y. 257.

The Rapid Transit Acts do not contravene the provisions of article 8, section 10, or article 3, section 18 of the Constitution, and are valid. *Id.*

A street railway constructed and owned by a city, after a failure of private enterprise to do so, is for "a city purpose," within the meaning of article 8, section 10 of the Constitution. *Id.*

The provisions of Laws 1846 (chap. 216), incorporating the Hudson River R. R. Co., as amended by Laws 1848 (chap. 30, § 5), authorizing the directors to adopt a new and altered location of the route, in their discretion, by filing a map of the course as altered, conveyed no title to the lands embraced in such altered route.

N. Y. Central, etc., R. R. Co. v. Aldridge, 135 N. Y. 83.

It seems that the act of 1848 applies to what is in reality only an alteration. *Id.*

The filing of a map by the company for the purpose of making an addition to its original course will not affect the power of the commissioners of the land office to make a grant of lands under water to an upland proprietor. *Id.*

If the commissioners have already conveyed the lands to the owner of the uplands, then the company must negotiate with their grantee. *Id.*

A grantor on conveying originally to a railroad a strip of land partly below and partly above high-water mark, only vests the company with a fee for the purposes embraced in its charter. *Id.*

Where a stockholder dies after paying a first installment on

Railroads—Continued.

stock, and his personal representative refuses to pay the other installments, the right to make the exchange of stock is gone.

Dow v. Iowa Central R. Co., 144 N. Y. 426.

A lease by a railroad authorized to operate a street surface railroad, whose tracks cross those of a steam railroad at grade, confers upon the lessee no greater rights than the lessor had.

Port Richmond & Prohibition Park R. R. Co. v. Staten Island R. T. R. R. Co., 144 N. Y. 445.

Use of a crossing for four months by permission pending negotiations for an agreement, gives no right to use the crossing. *Id.*

What lease of franchises by the owner of the tracks to a rival of another party, subject to the rights of the latter, does not justify a breach of the agreement by the other party.

Prospect Park & Coney Island R. R. Co. v. C. I. & B. R. R. Co., 144 N. Y. 152.

The use of the trolley system by one of the parties to an agreement is not the use of "steam" as a motive power. *Id.*

A condition that no passenger shall be charged more than a specified sum for a continuous ride from or to such an extension, is a substantial compliance with the provisions of the statute that but one fare shall be exacted on the question.

Beekman v. Third Ave. R. R. Co., 153 N. Y. 144.

What extensions of an existing railroad may be made at a sale by order of common council. *Id.*

What condition of granting its consent the common council cannot impose. *Id.*

The provisions of the Rapid Transit Act of 1875 are not violated or rendered ineffective by the grant of a conditional instead of a complete and absolute franchise.

Matter of Atlantic Ave. El. R. R. Co., 136 N. Y. 292.

Circumstances which will not prevent the elevated company from acquiring its franchise or capacity as a corporation, or from taking proceedings to determine the construction of its road. *Id.*

A further provision in the proposed agreement which forbids the maintenance of its road by the elevated company, if the contract by the parties should be terminated, is not unreasonable. *Id.*

Certificates issued by a receiver of a railroad who was appointed in an action to which all the bondholders were not made parties are not entitled to priority over the bonds held by the persons so omitted. *Stevens v. Central National Bk.*, 144 N. Y. 50.

Provisions of Laws 1892, chapter 711 (§§ 2 and 3), defining a day's labor and providing for proportionate compensation for fractional parts of a day, are not penal in their nature.

People v. Phylfe, 136 N. Y. 554.

Turnpike company authorized by statute Laws 1862, chapter 233,

Railroads—Continued.

to construct railroad tracts, *held*, entitled to use the single trolley system.

Hudson River Telephone Co. v. Watervliet Turnpike & Ry. Co., 135 N. Y. 393.

The fact that that system was not in use or discovered at the time of the passage of the enabling act, will not restrict the powers of the corporation. *Id.*

The railroad is not irrevocably bound by its original choice of a motive power, but may change same with consent of common council. *Id.*

II. CONSTRUCTION.**(a) Generally.**

A railroad cannot by virtue of sections 24 and 28 of the General Railroad Act of 1850 obstruct a street though it substitutes another. *Buchholz v. N. Y., L. E. & W. R. R. Co.*, 148 N. Y. 640.

The construction of an approach, under chapter 702 of the Laws of 1872, to a bridge over 4th Avenue at 42d Street was a change of grade; liabilities of a railroad company to abutting owners, considered.

Talbot v. N. Y. & H. R. R. Co., 151 N. Y. 155.

When court should appoint commissioners to estimate compensation for lands taken by railroads.

Matter of Southern Boulevard R. R. Co., 146 N. Y. 352.

The power to appoint commissioners given to the Supreme Court by the General Railroad Law is not affected by chapter 723, Laws 1887, in relation to the Southern Boulevard. *Id.*

Where proof of the actual rentals of plaintiff's property cannot be given, proof of the depreciation in rental values of similar properties, etc., may be shown.

Cook v. New York El. R. R. Co., 144 N. Y. 115.

Expert testimony is admissible in such an action to establish fee and rental values. *Id.*

Where property owners refuse consent, the Supreme Court may determine whether it should authorize the act proposed.

Matter of East River Bridge Co., 143 N. Y. 249.

Where the commissioners decide adversely to the construction proposed, their decision is final. *Id.*

Where there is no assurance of capital sufficient to pay property-holders and to complete the construction, the confirmation of the report will be denied. *Id.*

The provision of section 18 of article 3 of the Constitution went into effect January 1, 1896, and until such time the General Term continued to have jurisdiction applications for appointment of commissioners to decide if street railroad should be constructed.

Matter of Board of Rapid Transit Railroad, 147 N. Y. 260.

Railroads—Continued.

The commissioners of the land office have power to grant lands under water to a railroad company to be used for the purposes of its road, although the company is not an adjacent riparian owner. *Saunders v. N. Y. C. & H. R. R. Co.*, 144 N. Y. 75. Such grant, however, does not extinguish or impair the right of the upland owner to access to the river, and to make a landing.

Id.

Where the roadbed of a railroad company is on land granted to it by the state, it is the duty of the company to construct and maintain convenient roads across or under its road.

Id.

Lands under water may be taken by condemnation proceedings by a railroad. *Kerr v. West Shore R. R. Co.*, 127 N. Y. 269.

A railroad company cannot condemn lands for purposes other than those of the railroad proper.

In re Rochester & Glen Haven R. R. Co., appeal dismissed, 128 N. Y. 611.

When lands necessary for the purpose of rapid transit have been as much appropriated to that exclusive use as though it had been so declared by special enactment.

Suburban Rapid Transit Co. v. Mayor, etc., of N. Y., 128 N. Y. 510.

Upon obtaining the necessary consents of the public authorities and the property owners, the corporation acquires an indestructible franchise, in the exercise of which the condemnation of the land is but an incident.

Id.

A corporation created under this act commences its existence with all its plans determined for it, and the inchoate character as to the construction and operation which appertains to a corporation organized under the General Railroad Act, even after its incorporation, does not attach to it.

Id.

In the absence of express language no implication of an intention on the part of the legislature to supersede the prior devolution of property to the public uses of a railroad can be predicated upon general terms of an act which does not require such a construction to be put upon it.

Id.

Substantial compliance with the statute requiring the record of award is sufficient.

Morgan v. N. Y. & Mass. Ry. Co., 130 N. Y. 692.

A determination of the value of property in condemnation proceedings under the General Railroad Act, *held*, to be conclusive upon the owner who had previously commenced an action for an injunction. *Oberfelder v. Met. El. Ry. Co.*, 138 N. Y. 181.

The General Term has power to review the report of commissioners appointed under the General Railroad Act to award damages. *Matter of Southern Boulevard R. R. Co.*, 143 N. Y. 253.

Where the General Term directs a new appraisal, the second report is final and conclusive both as to law and facts.

Id.

Railroads—Continued.

When a railroad corporation does not forfeit its charter by failure to extend road.

People v. Ulster & Delaware R. R. Co., 128 N. Y. 240. The filing of a certificate of railroad commissioners practically abolishes the penalty imposed by the act of 1874, in certain cases, and while there is no retroactive operation, yet since there is no clause in the amendatory act saving pending prosecutions from its effect, all actions in which judgments had not been obtained were left subject to the rule created by the amendment and the certificate becomes a bar to such an action.

Id.

Verification of a petition by the attorney in condemnation proceedings is sufficient when he was duly authorized to so verify.

Matter of St. Lawrence & Adirondack R. R. Co., 133 N. Y. 270.

(b) Elevated Roads.

Where the plaintiff conveys the abutting premises, *pendente lite*, to one not a party to the action, he thereby deprives himself of the right to injunctive relief or to damages accruing subsequent to the conveyance.

Pegram v. New York El. R. R. Co., 147 N. Y. 135. The right to a jury trial on the question of past damages, where the premises in question are conveyed during the pendency of the action, is waived by defendant's failure to take steps to obtain one or to object to a trial at an equity term.

Id.

In such case, however, the court having obtained jurisdiction, may retain it and award the past damages sustained.

Id.

Leasing of an elevated railroad does not abate condemnation proceedings.

Matter of N. Y. Elevated R. R. Co., 133 N. Y. 690.

Where there is a finding that there were no actual, substantial or peculiar benefits to plaintiff's property arising from the construction and operation of the elevated railroad, a refusal to find that the easements taken, aside from the damage to the land, had in themselves only a nominal value, is not ground for reversal.

Cook v. New York El. R. R. Co., 144 N. Y. 115. A surrender of a lease to allow partition of property, *held*, to operate to continue proceeding title as against railroad.

Witmark v. New York El. R. R. Co., 149 N. Y. 393. In an action against an elevated railroad, a renewal lease is admissible to show continuance of a preceding title.

Id.

It is not error to admit in evidence a tabulated statement of rents which have been testified to.

Id.

When a grantor does not abandon easement by a transfer of the property.

Foote v. Metropolitan El. R. R. Co., 147 N. Y. 367. What constitutes an abandonment of easements by an abutting owner to an elevated railroad.

Ward v. Metropolitan El. R. R. Co., 152 N. Y. 39.

Railroad—Continued.

What is sufficient notice to an intending purchaser of abutting property on an elevated railroad of easements enjoyed by the railroad. *Id.*

An intending purchaser of property cannot depend upon any presumption that possession of an elevated railroad continues to be wrongful. *Id.*

Where the plaintiff in an action against an elevated railroad conveys his premises, he may recover damages while he was owner.

Van Allen v. New York El. R. R. Co., 144 N. Y. 174.

When in an action against an elevated road it is error to refuse to charge that property at the time the road was erected, and was unimproved in the locality where such facts have been shown.

Malcolm v. New York El. R. R. Co., 147 N. Y. 308.

When injunction should not be granted where rental value has increased since operation of the railroad.

O'Reilly v. New York El. R. R. Co., 148 N. Y. 347.

Error in the omission of testimony as to rental value of property cannot be taken for the first time on appeal.

Randall v. New York El. R. R. Co., 149 N. Y. 211.

When refusal to find as to the existence and amount of the premium on gold between certain years is not a reversible error.

Id.

When a dismissal of a complaint for damages for the erection and maintenance of an elevated railroad should be dismissed because of increase of value of property.

Bookman v. New York El. R. R. Co., 147 N. Y. 298.

Refusal of tenant to remain at same rental value is admissible in an action against a railroad company for maintaining elevated road.

Hine v. New York El. R. R. Co., 149 N. Y. 154.

Evidence may be given as to the effect of the road upon the light to the premises.

Id.

Testimony of owner of real estate who did not fix or collect rents is not admissible.

Domschke v. Metropolitan El. R. R. Co., 148 N. Y. 337.

Power of reopening a case for further testimony in an action against an elevated road rests in the discretion of the referee.

Id.

It is not admissible in an action by an elevated railway to prove the effect in diminishing values by the process of calling owners of property in the vicinity.

Jamieson v. Kings Co. El. R. R. Co., 147 N. Y. 322.

Although damage to fee value is nominal, the proof of substantial injury to rental value of abutting premises will warrant a granting of an injunction.

Id.

Railroads—Continued.**III. OPERATION.****(a) Duties to Passengers.**

A common carrier need not bring home to each passenger a personal knowledge of any rule it has made.

Barker v. C. P., N. & E. R. R. Co., 151 N. Y. 237.

A tender of a \$5 bill to the conductor on a street railway car is unreasonable. *Id.*

Section 46 of the General Railroad Act of 1850, exempting railroad companies from liability for injuries to passenger while riding on the car platform, does not apply to a street railroad.

Vail v. Broadway R. R. Co., 147 N. Y. 377.

A railroad company intending to claim immunity from a liability under some statute, should plead the facts upon which they would claim immunity. *Id.*

The falling of an iron bar from an elevated railroad raises the presumption of negligence.

Hogan v. Manhattan Ry. Co., 149 N. Y. 23.

Proof that platforms were crowded and that, in confusion, plaintiff was injured by a quarrel of the gateman with passenger, tends to show negligence on the part of the railroad company.

Graham v. Manhattan Ry. Co., 149 N. Y. 336.

A railroad company permitting the public to cross a lot owes no duty of active vigilance.

Walsh v. Fitchburg R. R. Co., 145 N. Y. 301.

Servants of a street railroad company have no right to violently assault or frighten passenger while removing him for proper cause.

Ansteth v. Buffalo Ry. Co., 145 N. Y. 210.

A railroad owes duty of protection against negligence to a passenger who has got upon the wrong train by mistake.

Lewis v. D. & H. C. Co., 145 N. Y. 508.

Where a conductor invites or requests a passenger to leave the car without informing him of the danger, a finding of negligence. *Id.*

Case where no negligence on the part of the railroad was shown for injuries to one caused by horses frightened by escaping steam of engine.

Scaggs v. D. & H. C. Co., 145 N. Y. 201.

The raising of the gates at a street crossing by a railroad employe does not relieve travelers from using vigilance. *Id.*

(b) Track, Ground, Fences, Highways.

A railroad company is not relieved from its statutory liability for failure to fence its road by the fact that it lies between and immediately adjoining two parallel roads.

Kelver v. N. Y., Chicago, etc., R. R. Co., 126 N. Y. 365.

A company is not relieved from liability by reason of the narrow space between its tracks and those of the adjoining roads. *Id.*

Railroads—Continued.

A railroad company is not charged with the duty of restoring a private road crossed by its tracks.

Kerr v. West Shore R. R. Co., 127 N. Y. 269.

The provision of the General Railroad Act, section 28, subdivision 5, requiring streams or water-courses intersected or touched by a railroad to be restored, etc., construed. *Id.*

In an action for unlawfully severing the connection of plaintiff's railroad with the defendants, carried on under an oral agreement, the complaint may be dismissed.

Port Jervis, Monticello & N. Y. R. R. Co. v. N. Y., Lake Erie, etc., R. R. Co., 132 N. Y. 439.

An agreement for such a connection is within the Statute of Frauds. *Id.*

For failure to restore highway to its proper condition, both a public and private remedy exists.

Bryant v. Town of Randolph, 133 N. Y. 70.

Where a railroad company which has laid its tracks upon a highway undertakes to restore it by laying out a new highway, it is not sufficient that it be made of the same width, grade and general direction as the old one, but it must be made safe with reference to the new surroundings and circumstances.

Allen v. Buffalo R. & P. R. R. Co., 151 N. Y. 434.

The statutory duty of restoring a highway appropriated by a railroad is a continuing obligation. *Id.*

No railroad or other business corporation has a right to perform acts resulting in consequential injury to property without awarding damages for such compensation.

Booth v. Rome, Watertown, etc., R. R. Co., 140 N. Y. 267.

When the building of a bridge by a railroad company across waters of the state does not constitute an illegal obstruction.

Hedges v. West Shore R. R. Co., 150 N. Y. 150.

Where a street railroad crosses a canal over a bridge erected by the state at a street crossing, such use of the bridge, with the consent or license of the state, does not render it an appliance of the railroad company.

Birmingham v. Rochester City & Brighton R. R. Co., 137 N. Y. 13.

Such company is not, therefore, liable for an injury to a passenger, caused by a latent defect in bridge. *Id.*

The owner of the fee has no right to use, occupy or interfere with the easement existing in favor of another.

Roby v. N. Y. Central, etc., R. R. Co., 142 N. Y. 176.

An award in condemnation proceedings does not affect the right to compel the erection of a crossing on the property in question.

Beardsley v. Lehigh Valley Ry. Co., 142 N. Y. 173.

Railroads—Continued.

Crossings are maintained to enable owners having land on both sides of road to reach railroad.

Buffalo Stone & Cement Co. v. Delaware, Lackawanna, etc., R. R. Co., 130 N. Y. 152.

Provisions of statute are not limited to crossings for agricultural purposes only. *Id.*

Nor is the right limited where the same ownership is on either side. *Id.*

It is the duty of the lessee of a railroad to construct farm crossings. *Id.*

The obligations extend to foreign corporations operating in this state. *Id.*

A suitable crossing may be required by the adjacent owner. *Id.*

(c) Running of Trains.

The duty of a railroad company to shipper on whose private track the switch engine is sent to remove cars; notice that engine is coming to shipper is sufficient.

McInerney v. Prest., etc., D. & H. Co., 151 N. Y. 411.

When a railroad company permitting cars to be switched and kicked upon tracks running into repair shop is liable for failure to furnish a safe place for working men employed in the shop.

Doing v. N. Y., O. & W. R. R. Co., 151 N. Y. 579.

The duty of a railroad company is to change the manner of operation where it is known that its employees are doing work in a reckless manner. *Id.*

An ordinance requiring railroad trains to cross the streets of a populous city at a rate of speed not exceeding six miles an hour is reasonable on its face, and is not invalidated by the fact that it exempts from its operation trains of a belt line operated for local traffic at a fixed fare.

City of Buffalo v. N. Y., L. E. & W. R. R. Co., 152 N. Y. 276.

An ordinance requiring trains to stop before crossing certain streets is reasonable on its face. *Id.*

It is no defense to an action for violation of a municipal ordinance regulating the speed of trains that others are violating such ordinance and are not prosecuted. *Id.*

(d) Duties to Servants.

Failure to fasten a turntable situated upon its own land is not negligence which will render the company liable for injuries sustained by a child while playing with it, although the public were permitted to cross such land.

Walsh v. Fitchburg R. R. Co., 145 N. Y. 301.

What testimony is sufficient to authorize inference that the condition of the roadbed was such as to cause a wreck.

Wooden v. Western New York & Pennsylvania R. R. Co., 147 N. Y. 508.

Railroads—Continued.

Although a freight train is only equipped with hand-brakes, such evidence alone does not charge the company with negligence.

Id.

Brakeman assumes the risk which the conductor takes in carelessly taking a train to a certain point which posted rules of the company leave to his discretion.

Id.

Where a railroad company has promulgated proper rules for its servants and knows of no violation thereof, it is not chargeable with negligence in failing to detect an habitual violation of duty in a servant.

Cameron v. N. Y. C. & H. R. R. Co., 145 N. Y. 400.

Question whether defendant had actual notice of defects in an abutment, not visible or capable of detection from the outside, one for the jury.

Bogart v. D., L. & W. R. R. Co., 145 N. Y. 283.

Submission of the question of defendant's negligence in location of mail crane, *held*, erroneous under facts proven.

Sisco v. Lehigh & Hudson River R. Co., 145 N. Y. 296.

Where a finding that a scorching of boiler took place at some prior time is not justified.

Hudson v. R., W. & O. R. R. Co., 145 N. Y. 408.

IV. TOLLS AND CHARGES.

The liability of a railroad company as a carrier begins when goods are delivered to and accepted by it for immediate transportation.

London & Lancashire Fire Ins. Co. v. R., W. & O. R. R. Co., 144 N. Y. 200.

Where goods are delivered to a railroad company for immediate transportation, the company is liable therefor as a carrier.

Id.

Where a corporation by its acts waives an objection, it cannot afterwards take advantage of it.

Mayor, etc., of N. Y. v. Manhattan Ry. Co., 143 N. Y. 1.

Where the law presents the payment of a percentage of net receipts, no default is made until the method of computing the percentage is prescribed.

Id.

No payment can be demanded from the receipts of a branch road constructed by the corporation.

Id.

But where such payments have been voluntarily made, they cannot be recovered.

Id.

Where such percentages have been paid voluntarily, the railroad cannot counter-claim for amounts paid by it to abutting owners.

Id.

V. MORTGAGES.

When action upon a covenant in a mortgage bond will not lie.

Belden v. Burke, 147 N. Y. 542.

Railroads—Continued.

Subsequent purchasers, however, without notice of the actual transportation may seek relief. *Id.*

Rape ; See Criminal Law.

It is not essential that the prosecutrix be corroborated in all material points. *People v. Terwilliger*, 142 N. Y. 629.

Under the provisions of the Penal Code, as formerly, any partial or voluntary submission of the prosecutrix will amount to a consent. *People v. Connor*, 126 N. Y. 278.

When the assault is committed by the sudden and unexpected exercise of overpowering force upon a timid and inexperienced girl under circumstances indicating the power and will of the aggressor to effect his object, and an intention to use any means necessary to accomplish it, a case is presented for the jury. *Id.*

Rapid Transit Act ; See Railroad.**Ratification ; See Agency.**

The fact that the principle at the time the receipts of the proceeds of an unauthorized contract were received operates as ratification. *Smith v. Barnard*, 148 N. Y. 420.

What is not the ratification of an unauthorized employment by the minority members of the board of trustees.

Parshley v. Third M. E. Church in Brooklyn, 147 N. Y. 583.

An employment by such minority is not ratified by the appointment of a committee to examine the claim of the person employed. *Id.*

It is certainly not by the action of the official board recommending voluntary contributions to pay for such services. *Id.*

Real Estate ; See Adverse Possession ; Assignment for Creditors ; Cloud on Title ; Commissioners of Land Office ; Covenant ; Deeds ; Devise ; Easements ; Fixtures ; License ; Mortgage ; Powers ; Public Land ; Real Property ; Recording Conveyances ; Specific Performance ; Statute of Frauds ; Title to Land ; Vendor and Purchaser.

A reservation in a deed by a riparian owner of "all the water grants and rights" in the river, will not prevent the grantee from applying, as adjacent owner, to the land commissioners for a grant of the lands under water.

People ex rel. Blakslee v. Comm'rs of Land Office, 135 N. Y. 447.

A growing crop of grain possesses the characteristics of a chattel, and is salable. *Sexton v. Breese*, 135 N. Y. 387.

Where defendant advanced the money for payment of unpaid

Real Estate—Continued.

- purchase money on property to which another had taken title, and defendant was given possession and assumed a mortgage, he did not take the legal estate by virtue of any trust resulting to him. *Bates v. Ledgerwood Mfg. Co.*, 130 N. Y. 200.
- A trust must be declared by deed or conveyance in writing. *Id.*
- An owner in possession has a right to defend his possession. *People v. Kane*, 131 N. Y. 111.
- Owner of real estate may destroy any property of another which he finds on his land, and which the owner thereof refuses to remove. *Id.*

Receipts ; See Evidence.**Receivers ; See Corporations ; Execution and Supplementary Proceedings ; Foreclosure ; Insurance ; Railroads.**

- Is liable for the rents of his lessee's property when sub-leased. *Wells v. Higgins*, 132 N. Y. 459.
- Receiver of estate of lessee is liable for rents reserved in lease. *Id.*
- Where no property is received and order of appointment is vacated, he is entitled to his discharge. *People v. Bushwick Chemical Co.*, 133 N. Y. 694.
- When a creditor of an insolvent corporation entitled to interest on a dividend. *People v. E. Remington & Sons*, affirmed on opinion, 126 N. Y. 679.
- Where a receiver came into the possession of articles manufactured under a license from a patentee, sale of articles entitles patentee to preference. *Id.*
- The creditor's right to interest for the time payment was delayed by the contest is not defeated by the fact that during such period the receiver kept on deposit with the creditor funds of the corporation largely in excess of the claim. *Id.*
- A contract to pay royalties for the manufacture and sale of patented articles does not give a lien upon the articles. *Id.*
- An order appointing a receiver in proceedings for the voluntary dissolution of a corporation vests the title to the property in such receiver, and the court appointing him may restrain proceedings to reach the property. *Matter of Schuyler's Steam Tow Boat Co.*, 136 N. Y. 169.
- When temporary receiver of a corporation is made permanent receiver unless required to do so by the court his temporary receiver's bond suffices. *Jones v. Blun*, 145 N. Y. 333.
- A receiver in supplementary proceedings has no power to determine whether a fund in his hands belongs to certain creditors. *Matter of Hone*, 153 N. Y. 522.

Receivers—Continued.

When the complaint alleges an answer does not deny dissolution of a corporation, the fact that defendant was appointed receiver sufficiently appears. *Ludington v. Thompson*, 153 N. Y. 499.

A receiver may maintain an action in equity to compel a person to account and deliver funds which the receiver has acquired title to. *Armstrong v. McLean*, 153 N. Y. 490.

The grantee of the judgment debtor of such real estate may move to set aside an order directing sale.

Faneuil Hall Nat. Bk. v. Bussing, 147 N. Y. 665.

The mere filing by the receiver of an order appointing him in another county does not vest in him the title to the real estate of the debtor. *Id.*

A conveyance by the judgment debtor, made after the order appointing the receiver was filed in the county in which the judgment was not obtained, is valid. *Id.*

The continuance of a receiver for more than a year after his appointment in the absence of other evidence is *prima facie* evidence that his bond was filed. *Hegswisch v. Silver*, 140 N. Y. 414.

A temporary receiver may maintain an action to collect a judgment entered against the corporation in contemplation of insolvency. *Nealis v. American Tube & Iron Co.*, 150 N. Y. 42.

If premises leased to a corporation are vacant before the expiration of the term on the appointment of a receiver in a statutory proceeding for the dissolution of the corporation for insolvency, and the lessor, in accordance with the term of the lease, re-enters and re-lets to a third party for the unexpired term at a less rental, the difference between the rent for the balance of the term reserved under the original lease and that reserved under the sub-letting constitutes a definitely established claim against the corporation. *People v. St. Nicholas Bank*, 151 N. Y. 592.

The situation of the receiver of an insolvent corporation is less restricted than that of an assignee under a general assignment for the benefit of creditors. *Id.*

A receiver is not entitled to commissions on sums erroneously paid to him. *Pittsfield Nat. Bank v. Bayne*, 140 N. Y. 321.

The fact that the party making the payment consented to the receiver paying over the money to the proper party does not entitle the receiver to claim commissions. *Id.*

Recognizance ; See Criminal Law.

Under Code Criminal Procedure (§ 593), if the principal makes default and his non-appearance is entered in the minutes, the recognizance becomes *ipso facto* forfeited.

People v. Bennett, 136 N. Y. 482.

The fact that time elapses before the district attorney obtains a formal order forfeiting the recognizance, in which interval the

Recognizance—*Continued.*

principal is surrendered, will not impair the validity of such judgment. *Id.*

A formal record of the forfeiture of bail in a criminal action, where the defendant does not appear for arraignment, is not absolutely requisite. *People v. Bennett*, 137 N. Y. 601.

Recording Conveyances : *See Deeds ; Foreclosure ; Mortgagees ; Notice ; Purchaser for Value ; Vendor and Purchaser.*

The first record of a deed showed no sign of a seal, but subsequently the deed was again recorded with a seal, the record title would not justify a purchaser in rejecting it as defective.

Todd v. Union Dime Savings Institution, affirmed, 128 N. Y. 636.

What is strong proof of a defective title, and sufficient to put a prudent man upon inquiry. *Ten Eyck v. Witbeck*, 135 N. Y. 40.

A purely nominal consideration, though actually paid, is insufficient to protect the grantee against a prior unrecorded conveyance. *Id.*

The rule applies although the grantor is the father of the grantee and a life estate is reserved. *Id.*

It seems that upon failure of the conveyance, by reason of a prior deed, the grantee is relieved from the obligations imposed. *Id.*

It seems that where the subsequent conveyance is a mortgage, and only part of the consideration is paid, the mortgage may be enforced to the extent to which the mortgage has parted with value. *Id.*

Unrecorded deed is not void as against a subsequent purchaser who had notice of its existence.

Dingley v. Bon, 130 N. Y. 607.

Recitals in deeds which do not purport to convey the absolute fee to such purchaser's predecessor is notice. *Id.*

A deed which is in fact a mortgage protects the grantee only to the extent of payments innocently made.

Macaulay v. Smith, 132 N. Y. 524.

Records.

What documents are within the purview of Penal Code (§ 94), which makes it a crime to remove or mutilate any document filed or deposited with any public officer.

People v. Peck, 138 N. Y. 386.

Where the commissioner of statistics of labor appointed under Laws 1883, chapter 356, Laws 1886, chapter 205, had sent out circulars calling for statistic details mentioned in the act, and received answers thereto, *held*, that such officer was a public officer, and the papers received were papers within section 44 of the Penal Code. *Id.*

Records—Continued.

What is sufficient notice to an intending purchaser of abutting property on an elevated railroad of easements enjoyed by the railroad.

Ward v. Metropolitan El. R. R. Co., 152 N. Y. 39.

An assignment of a mortgage need not be recorded as against a subsequent purchaser of the premises, but only as against a subsequent purchaser of the mortgage itself.

Curtis v. Moore, 152 N. Y. 159.

A recorded agreement to sell lands when they are acquired by the promisor, is not constructive notice to a subsequent mortgage of the premises, where promisor had no title at time of recording agreement.

Oliphant v. Burns, 146 N. Y. 218.

A mortgage is not merged by a judgment of foreclosure so far as to blot out its record or relieve one looking at the judgment and deed given on the sale under it from the effect of such record as notice of what the mortgage contains.

Bernstein v. Nealis, 144 N. Y. 347.

Recoupment ; *See Counter-Claim.*

Recovery of Possession of Personal Property ; *See Replevin.*

Recovery of Possession of Real Estate ; *See Ejectment.*

Redemption ; *See Execution ; Taxation.*

The owner of one of several lots covered by a single mortgage may maintain an action to redeem upon paying the amount of the mortgage, and in such action may reimburse himself by charging the due proportion upon the other lands covered by the mortgage.

Coffin v. Parker, 127 N. Y. 117.

But the court cannot, in such action, direct the release of particular lots upon payment of their proportionate share, as the mortgagee is entitled to receive the whole amount due him before releasing his lien upon any part.

Id.

Where it appears in such case that the holder of the mortgage has collusively and fraudulently procured a prior mortgage upon a portion of the lots to be foreclosed, and such lots sold for less than their value, for the purpose of relieving them from the lien of his mortgage, the court will take from the amount necessary to effect a redemption the proportionate shares chargeable upon such lots.

Id.

An action by a remainderman to redeem after a default, judgment in ejectment against the life tenant is equitable in its nature, and may be sustained without any proof of fraud.

Sand v. Church, 152 N. Y. 174.

The six months Statute of Limitations does not apply to an action

Redemption—Continued.

of redemption brought by the remainderman in a case where the landlord had proceeded only against the life-tenant. *Id.*

Reference ; See Error ; Executors ; Practice.

- I. WHEN GRANTED.
- II. PRACTICE.
- III. REPORT AND FINDINGS.

I. WHEN GRANTED.

Court may order in a proper case without first trying affirmative defenses. *Brown v. Finch*, 133 N. Y. 671.

An action by a principal against its agent in regard to conversion of money and personal property is not referable, being a common-law action.

Empire State Telephone and Telegraph Co. v. Bickford, 142 N. Y. 224.

If it is necessary to have an accounting after the issues of law are tried, a reference may be had. *Id.*

An action to call an agent to account may be cognizable in equity. *Id.*

A provision in a policy that issues be referred on demand of the insurer is a nullity.

Sandford v. Commercial Travellers' Mut. Accident Ass'n, 147 N. Y. 326.

An action by an attorney for professional service is not compulsorily referable. *Feeter v. Arkenburgh*, 147 N. Y. 237.

An order of reference sustained, although the only specific allegation that no difficult question of law was involved was made by the plaintiff, not a lawyer.

Millen v. Fogg, appeal dismissed, 126 N. Y. 680.

An action on an attorney's account for services in one action between dates specified is not a long account.

Randall v. Sherman, 131 N. Y. 669.

An action for breach of a contract by which defendant leased to plaintiffs its franchises and rights to construct and operate a street railroad, *held*, not to involve the examination of a long account. *Johnson v. Atlantic Ave. R. R. Co.*, 139 N. Y. 449.

There is no provision of the Code which authorizes the court, before trial of equitable action, to direct a reference to take testimony as to the question of damages and to report the same to the court, question arises upon the pleading within the exception in the last clause of section 1015 of the Code.

Doyle v. Metropolitan El. Ry. Co., 136 N. Y. 505.

As to whether a statute authorizing such reference would be in violation of the Constitution,—query. *Id.*

Reference—*Continued.*

When court may upon its own motion order a reference against the objection of a party. *Cassidy v. McFarlane*, 139 N. Y. 201. This rule applied to reverse an order of the General Term affirming an order of reference in an action to foreclose a mechanic's lien. *Id.*

The referable quality of the action must appear from the complaint. *Id.*

Though the cause of action may be referable, the counterclaim interposed may be triable by a jury.

Deeves v. Metropolitan, etc., Co., 141 N. Y. 587.

A complaint containing two causes of action, one of which contains twenty-six charges, may be referred. *Id.*

Where the cause of action is not referable, the court cannot order a reference without consent of the parties.

Steck v. Colorado Fuel & Iron Co., 142 N. Y. 236.

What must be shown to sustain a compulsory order of reference on the ground that a long account is involved.

Spence v. Simis, 137 N. Y. 616.

A counterclaim for services as attorney and disbursements in four different suits, *held*, not such an account. *Id.*

A complaint for coal and wood delivered on fifteen different dates, *held*, not such an account. *Id.*

An action by a general creditor of the deceased insolvent debtor under chapter 740 of 1894 to set aside an alleged fraudulent conveyance is compulsorily referable where plaintiff's claim consists of many items of credits and debits.

National Shoe and Leather Bk. v. Baker, 148 N. Y. 581.

An action for commissions where the real question is as to amount due plaintiff, and whether a certain settlement was fraudulent, is referable. *Rowland v. Rowland*, 141 N. Y. 485.

II. PRACTICE.

The repeal of section 1023, Code Civil Procedure, by the act of 1894,—construed.

Lazarus v. Metropolitan El. Ry Co., 145 N. Y. 581.

When stipulation as to referee's fees is made at or before the commencement of the trial within the meaning of the statute.

Griggs v. Day, 135 N. Y. 469.

But such stipulation must fix the rate of compensation. *Id.*

Unless the stipulation for reference of a disputed claim against an estate provides otherwise, it is the duty of the court, upon a refusal of one or more of the referees named to serve, to appoint others, and he should not vacate the reference.

Hustis v. Aldridge, 144 N. Y. 508.

Power of reopening a case for further testimony in an action against an elevated road rests in the discretion of the referee.

Domschke v. Metropolitan El. Ry. Co., 148 N. Y. 337.

Reference—Continued.

- A stipulation for trial before a referee is not vacated by an order granting a new trial. *Brown v. Root Mfg. Co.*, 148 N. Y. 294.
- The requirement of section 1011 that another referee be appointed where a new trial is granted, applies to an action of ejectment under section 1525. *Id.*
- Section 1011 of the Code applies to a new trial in ejectment granted in section 1025. *Id.*
- A referee may permit an amendment of the answer upon the trial. *McLaughlin v. Webster*, 141 N. Y. 76.

III. REPORT AND FINDINGS.

- Failure to note discussion upon margin opposite each proposition is not refusal to make a finding. *McCulloch v. Dobson*, 133 N. Y. 114.
- The proper practice is to apply to the court to have the report corrected by referee. *Id.*
- If the referee failed to file or deliver the paper, it would not affect the validity of his decision. *Id.*
- Where a lease is in evidence, it is not necessary to incorporate it in the report. *Id.*
- Case considered in which erroneous omission of competent evidence is cured by notice of referee that he would disregard such evidence. *Blashfield v. Empire State Telephone & Telegraph Co.*, 147 N. Y. 520.
- What is a sufficient report within the meaning of the Code sufficient to prevent a termination of the references by a notice under Code Civil Procedure (§ 1019). *Tallmadge v. Lounsbury*, affirmed without opinion, 126 N. Y. 655.
- Court is not bound by findings in a special reference. *Drexel v. Pease*, 129 N. Y. 96.
- The referee in an action by an abutting owner is not required to find as to the effect of defendant's station in increasing the street traffic in the immediate neighborhood of plaintiff's premises. *Steubing v. N. Y. Elevated R. R. Co.*, 138 N. Y. 658.
- When request to find embraces several propositions, some of which party making request is entitled to and some not, a refusal of request as a whole is not error. *Id.*

Reformation of Instruments ; See Equity ; Mistake.

- Where a mistake is found in the conveyance of land, an abatement of the consideration expressed in the agreement may be ordered. *Gallup v. Bernd*, 132 N. Y. 370.
- Such correction could be made upon an equitable defense as well as in a suit brought directly. *Id.*

Reformation of Instruments—Continued.

Where the action is one to reform a deed of trust, the court will regard as done whatever the parties really intended.

Barnard v. Gantz, 140 N. Y. 249.

Where the settler intends to reserve the power of revocation, the court may enforce an attempted revocation commenced by her and continued by her personal representatives. *Id.*

Release; *See Accord and Satisfaction; Mortgage; Payment; Surety.*

No right of action can pass by a release of all causes of an action; the word "release" defined.

Trustees of Amherst College v. Ritch, 151 N. Y. 282.

When release releases a dormant partner, although the creditor was ignorant of his existence when release was given to his partners.

Harbeck v. Pupin, 145 N. Y. 70.

Payment made to a relative who subsequently receives letters of administration does not operate as an accord and satisfaction of the claim existing in form of the next of kin.

Stuber v. McEntee, 142 N. Y. 200.

Defendant may prove payment and its application for the benefit of deceased. *Id.*

When a release of the claim by one of the owners is as effectual as the release by all.

Hathaway v. Orient Ins. Co., 134 N. Y. 409.

In construing a release, general words are to be taken most strongly against the releasor; the effect of general words following particular recital,—considered.

Kirchner v. New Home Sewing Machine Co., 135 N. Y. 182.

What is not a particular recital within the foregoing rule which will not limit the effect of the release to the matters therein referred to. *Id.*

It seems that where a general release is set up as a defense to an action, the plaintiff may show mutual mistake and fraud. *Id.*

Such attempt to avoid the effect of the release is not like an attempted rescission of a contract, and the plaintiff has to tender restoration. *Id.*

Religious Associations; *See Churches; Trusts.*

The rule in *People's Bk. v. St. Anthony's Roman Catholic Church*, 109 N. Y. 512, that the trustees of a religious corporation have no separate or individual authority to bind the corporation,—applied.

Columbia Bk. v. Gospel Tabernacle Church, 127 N. Y. 361.

The provisions of Laws 1854 (chap. 50), operate to forbid sales or

Religious Associations—*Continued.*

mortgages of the real estate of religious associations without the assent of the court.

Dudley v. Congregation of Third Order of St. Francis, 138 N. Y. 451.

Foreign corporations are not included in exemption from taxation in section 2 of chapter 399, Laws 1892, of property devised or bequeathed to any religious corporation.

Matter of Balleis, 144 N. Y. 132.

What is not the ratification of an unauthorized employment by the minority members of the board of trustees.

Parshley v. Third M. E. Church in Brooklyn, 147 N. Y. 583.

An employment by such minority is not ratified by the appointment of a committee to examine the claim of the person employed.

Id.

It is certainly not by the action of the official board recommending voluntary contributions to pay for such services.

Id.

Remainders ; *See Devise ; Trusts ; Wills.*

Rent ; *See Landlord and Tenant.*

Repairs ; *See Landlord and Tenant.*

Replevin ; *See Commission.*

Acceptance of offer of judgment for all chattels other than those claimed establishes title to articles claimed which are sought to be recovered in an action of replevin.

Shepherd v. Moodhe, 150 N. Y. 183.

Where judgment debtor, under section 452 of the Code, should be made party to action of replevin of goods which were taken from him under an execution.

Rosenberg v. Salomon, 144 N. Y. 92.

Where judgment in a replevin action against a sheriff is not conclusive in a subsequent action to recover moneys paid in satisfaction of such judgment.

Converse v. Sickles, 146 N. Y. 200.

It is immaterial that the moneys paid in satisfaction of a judgment in replevin were not the identical moneys received for the goods.

Id.

Plaintiff cannot maintain an action to recover property of a third person when at the time he did not have the right to reduce it to possession.

Wise v. Grant, 140 N. Y. 593.

The right to reduce to possession does not extend to cases where the right is potential only, but may where the right is constructive.

Id.

An action of replevin will lie against a county clerk who retains certificates of deposit upon an unauthorized order of the court.

Read v. Brayton, 143 N. Y. 342.

Res Adjudicata ; *See Former Adjudication.*

Restitution.

The court has no authority to direct restitution by a junior attaching creditor of moneys received by him from the sheriff upon reversal of an order refusing to direct the sheriff to sell.

Gillig v. George C. Treadwell Co., 151 N. Y. 552.

Where a motion for restitution may be made.

Carlson v. Winterson, 146 N. Y. 345.

Restrictions of Trade ; *See Contracts.*

Revival ; *See Abatement and Revival.*

Riparian Owners ; *See Fisheries ; Navigable Waters ; Water-courses.*

The filling up of land under the water of a navigable river, by the owner of the adjoining upland, does not give title by accretion to land thus formed.

Saunders v. N. Y. C. & H. R. R. Co., 144 N. Y. 75.

Right of riparian owner does not include any right arising from use of lands under water or the bed of a tidal river below high-water mark. *Hedges v. West Shore R. R. Co.*, 150 N. Y. 150.

When the building of a bridge by a railroad company across waters of the state does not constitute an illegal obstruction.

Id.

Rochester ; *See Municipal Corporations.*

The requirement of the charter of Rochester of service of notice of intention to sue,—considered.

Werner v. City of Rochester, 149 N. Y. 563.

Rules of Court ; *See Practice.*

S

Salary ; *See Office.*

Sales ; *See Contracts ; Execution ; Executors ; Foreclosure ; Fraudulent Conveyances ; Judicial Sales ; Partition ; Powers ; Statute of Frauds ; Vendor and Purchaser.*

I. THE CONTRACT.

II. WHEN TITLE PASSES.

III. DELIVERY AND ACCEPTANCE.

IV. WARRANTY.

V. RESCISSION.

Sales—Continued.**VI. RIGHTS AND REMEDIES.****I. THE CONTRACT.**

When no abandonment of contract of sale was shown.

Rutty v. Consolidated Fruit Jar Co., affirmed without opinion, 126 N. Y. 639.

When a contract of sale of goods is executory.

Blossom v. Shotter, affirmed on opinion below, 128 N. Y. 679.

An agent who simply transmits to principal the offer of the third party does not act for such party, and his letter is not sufficient memorandum to satisfy Statute of Frauds.

Wilson v. Lewiston Mill Co., 150 N. Y. 314.

Correspondence in regard to a contract of sale,—considered.

Blossom v. Shotter, affirmed on this opinion, 128 N. Y. 679.

Where an executory contract of sale provided for delivery on a ship to arrive at the port of loading within 30 to 40 days, time was of the essence of the contract. *Id.*

A bill of sale, construed as a chattel mortgage, after default of the vendor in payment of the debt secured thereby, is a sale within the meaning of a contract reserving a royalty for the manufacture and sale of a patented article.

People v. E. Remington & Sons, affirmed on opinion, 126 N. Y. 654.

The sale of the stock and fixtures of a business does not necessarily include the "good will," and even if the "good will" is sold the vendor may engage in same business.

Costello v. Eddy, affirmed on opinion, 128 N. Y. 650.

When parol evidence is admissible to prove the amount agreed to be paid in a memorandum of sale.

Emmett v. Penoyer, 151 N. Y. 564.

The title to an article may pass upon a credit sale, if such is the intention of the parties.

Crosby v. Delaware & Hudson Canal Co., 141 N. Y. 589.

A contract for the manufacture of specified dies used in making gas-burners does not require that such dies should make a complete burner.

E. W. Bliss Co. v. United States Incandescent Gas Light Co., 149 N. Y. 300.

A manufacturer is not required to do more than to give notice that goods are ready for inspection, when no place of delivery is named in the contract, and the guaranty of payment provides that no delivery shall be made without direction from guarantor. *Id.*

II. WHEN TITLE PASSES.

The legal title to chattels not in existence cannot be transferred by way of mortgage.

Deeley v. Dwight, 132 N. Y. 59.

Sales—Continued.

So *held* of the attempted mortgage of machinery not manufactured. *Id.*

Receipt of payment for stock and payment of broker's commissions is insufficient to charge a person as seller as matter of law. *Aron v. De Castro*, 131 N. Y. 648.

III. DELIVERY AND ACCEPTANCE.

Damages for failure to deliver balance of goods sold by contract. *Brady v. Cassidy*, 145 N. Y. 171.

Where the vendees of goods consent to the sale by the vendors of a portion of the goods to other parties they thereby waive full performance on the part of the vendors. *Id.*

Facts admissible in an action for the price of the goods actually delivered to show a waiver of full performance in accordance with the terms of the contract. *Id.*

It is not a breach of contract to refuse to deliver an installment of goods until prior installments are paid for, when contract provides for such payment. *Raabe v. Squier*, 148 N. Y. 81.

It is admissible to prove that manufacturer knew the destination of the goods and question of his liability for latent defects rendering the goods unfit for transportation.

Carleton v. Lombard, Ayres & Co., 149 N. Y. 137.

Acceptance may be implied from failure to return goods after inspection. *Mason v. Smith*, 130 N. Y. 474.

Return of part is an acceptance of an offer to replace any unsatisfactory goods with better goods. *Id.*

IV. WARRANTY.

A warranty is limited to the time specified for approval. *Gentilli v. Starace*, 133 N. Y. 140.

A warranty survives acceptance of the goods where defects are latent. *Bierman v. City Mills Co.*, 151 N. Y. 482.

When implied warranty that articles shall be merchantable arises. *Id.*

A representation by a vendor as to value becomes a part of the contract, and may be enforced as a warranty under certain circumstances. *Titus v. Poole*, 145 N. Y. 414.

What statements are sufficient to justify a finding that the assertion as to value was intended to be a warranty. *Id.*

There is an implied warranty that a judgment exists on a sale of a judgment which vendor has levied upon and bought at an execution sale. *Flandrow v. Hammond*, 148 N. Y. 129.

How failure of title in such case may be shown. *Id.*

A manufacturer who sells goods made by himself impliedly warrants them free from latent defects which arise from process of manufacture which made them unmerchantable.

Carleton v. Lombard, Ayres & Co., 149 N. Y. 137.

Sales—Continued.

Liability for breach of such warranty survives acceptance where the defects are not apparent. *Id.*

V. RESCISSION.

Where a vendee has repudiated the contract, no tender is necessary. *Stokes v. Mackay*, 147 N. Y. 223.

Inability to deliver the stocks sold will not be inferred from the fact that they are pledged for a loan unless party is shown to be unable to redeem. *Id.*

Where a court of equity has power, upon rescission of the sale induced by fraud, to reach proceeds in the hands of the fraudulent vendee or his voluntary assignee for defrauded vendor.

American Sugar Refining Co. v. Fancher, 145 N. Y. 552.

VI. RIGHTS AND REMEDIES.

Measure of damages for breach of contract of sale of perishable articles. *Todd v. Gamble*, 148 N. Y. 382.

What is insufficient to constitute a waiver of vendor's rights which had already accrued under a contract, although vendor made subsequent offer to vendee as to sale of goods.

Riendeau v. Bullock, 147 N. Y. 269.

The failure of the consideration for a contract of sale entitled vendee to recover money paid.

Flandrow v. Hammond, 148 N. Y. 129.

A vendor of goods purchased by fraud may follow the proceeds in the hands of a sheriff. *Converse v. Sickles*, 146 N. Y. 200.

What constitutes a breach of the contract to sell from time to time as a whole. *Nicholas v. Scranton Steel Co.*, 137 N. Y. 471.

Refusal to abide by an award, as to an abatement of price, and to receive future deliveries unless the seller would make certain concessions, *held*, to be in effect a refusal to abide by the terms of the contract. *Id.*

The seller who retains the title to goods paid by installments, with notes, may maintain an action for the goods when purchaser assigns without surrendering the notes.

Brewer v. Ford, affirmed without opinion, 126 N. Y. 643.

Where the buyer of personal property is in default, the seller may store the property for the buyer and sue for the purchase price. *Van Brocklen v. Smeallie*, 140 N. Y. 70.

Or the seller may sell the property as agent for the buyer and recover any resulting deficiency. *Id.*

Or the seller may keep the property and recover the difference between the contract price and the market price at the time and place of delivery. *Id.*

In case of a re-sale it is not necessary that the sale should be at auction. *Id.*

Sales—Continued.

A partner's interest, being personal property, may be thus sold upon a re-sale. *Id.*

A breach of warranty in an executory sale of goods by sample entitles the buyer to damages.

Zabriskie v. Central Vermont R. R. Co., 131 N. Y. 72.

A contract of sale which points out a known standard by which to judge the quality of goods is a sale by sample. *Id.*

Where defects are discoverable, no warranty attending the sale, and the goods accepted after an inspection, damages for any variation in quality cannot be recovered. *Id.*

Otherwise, where the defects are not discoverable. *Id.*

Salvage ; *See Ships and Vessels.*

Sanity ; *See Insanity.*

Savings Banks ; *See Banks and Banking.*

No conditions in pass-book of a savings bank will permit the officers to carelessly shut their eyes and pay to any person presenting the pass-book.

Kummel v. Germania Savings Bk., 127 N. Y. 488.

Circumstances under which payment made to a person who is not in fact entitled to draw the deposit, though he may have possession of the book and present it at the time of payment, will not discharge the bank.

Gearns v. Bowery Savings Bk., 135 N. Y. 557.

Question of the care and diligence of the bank's officers on making a payment is one of fact. *Id.*

Schenectady ; *See Municipal Corporations.*

The city of Schenectady has no power to take lands along the natural banks of a non-navigable stream without compensation to owner.

City of Schenectady v. Furman, 145 N. Y. 482.

A city can only under charter require the owner to clean the stream. *Id.*

Seals.

Where the letters "L. s." are after the signature, a failure to place the seal is not fatal.

Barnard v. Gantz, 140 N. Y. 249.

Searches ; *See Real Estate.*

Seduction ; *See Criminal Law ; Master and Servant ; Parent and Child.*

Within what time an indictment for seduction may be filed.

People v. Nelson, 153 N. Y. 90.

Seduction—Continued.

The age of consent fixed by statute defining rape does not apply to the crime of seduction. *Id.*

The term "chaste character" defined. *Id.*

Promise to marry in case pregnancy resulted will not warrant conviction for seduction under promise of marriage under section 284 of the Penal Code.

People v. Van Alstyne, 144 N. Y. 361.

Sentence ; See Criminal Law.

Objection that a sentence in a capital form did not specify the mode in which the death should be inflicted, is no ground for reversal. *People v. Trezza*, 128 N. Y. 529.

The Penal Code did not remove the power of a court of special criminal jurisdiction to suspend sentence.

People ex rel. Forsyth v. Court of Sessions of Monroe, 141 N. Y. 288.

The power to suspend sentence during good behavior is not unconstitutional as encroaching upon the pardoning power of the executive. *Id.*

The court cannot preclude itself or its successor from passing sentence whenever such a course appears to be proper. *Id.*

Service of Process ; See Practice.

An attorney for a foreign corporation is not a managing agent upon whom service of summons may be made within Code Civil Procedure (§ 432).

Taylor v. Granite State Provident Assoc., 136 N. Y. 343.

The general superintendent of the work of operating the lines of a telegraph company incorporated in New York, *held*, to be a managing agent of the corporation within Code Civil Procedure (§ 431).

Barrett v. Am. Telephone & Telegraph Co., 138 N. Y. 491.

The designation by a foreign insurance company of the state superintendent of insurance to receive service for it within this state, is official in its character and not personal.

South Publishing Co. v. Fire Asso. of Phila., affirmed without opinion, 137 N. Y. 610.

An order for service of summons need not embody the two alternative modes specified in Code.

Matter of Field, 131 N. Y. 184.

Where plaintiff died before service was completed, executrix should make new publication. *Reilly v. Hart*, 130 N. Y. 625.

Service may be made upon finding that plaintiff is unable with due diligence to make personal service within the state.

Crouter v. Crouter, 133 N. Y. 55.

A party to the action as well as a witness is exempt from service

Service of Process—Continued.

of process, while without the jurisdiction of his residence for the purpose of attending court in the action to which he is a party, or in which he is sworn as a witness.

Parker v. Marco, 136 N. Y. 585.

Circumstances under which party was privileged from the service of process. *Id.*

In such case, the plaintiff had an absolute right under United States Revised Statutes (§ 863), to take the testimony of his witnesses before a notary in this state. *Id.*

The compulsory character of the proceedings was not affected by the waiver of notice, and the fixing of the time of the examination by agreement. *Id.*

It seems that a writ of privilege or protection may still be issued by a court having common-law jurisdiction, but is not essential to give protection. *Id.*

Where an affidavit for an order of publication, stating "that defendant is a non-resident of this state nor can be found therein," is insufficient. *McCracken v. Flanagan*, 127 N. Y. 493.

The affidavit of the person who served the summons is not requisite if there is other competent proof of such service.

Murphy v. Shea, 143 N. Y. 78.

Where the judgment roll recites the appearance and answer of a guardian *ad litem*, sufficient jurisdiction is shown, and the infant is bound by the judgment. *Id.*

In order to sustain an application for an order of publication the verified complaint must show a cause of action which is sufficient against the defendant and of which the court has jurisdiction. *Paget v. Stevens*, 143 N. Y. 172.

Section 638 of the Code requires a regular formal service of the attachment.

Kieley v. Central Complete Combustion Mfg. Co., 147 N. Y. 620.

A summons cannot be served on a person in charge of the property attached. *Id.*

Service upon a person as managing agent of a foreign corporation ineffective unless his actual relation to the company is proven.

Coler v. Pittsburgh Bridge Co., 146 N. Y. 281.

Set-off; See Counterclaim.

The mere existence of reciprocal and independent demands is not sufficient to authorize a set-off in equity.

Pond v. Harwood, 139 N. Y. 111.

Purchase of a claim against plaintiff after suit brought without consideration and with knowledge of his insolvency will not entitle defendant to a set-off. *Id.*

In an action by the state upon contract, the defendant cannot set

Set-off—*Continued.*

off damages caused by the breach of the other contracts of the state.

People v. Corner, affirmed, *it seems*, without opinion, 128 N. Y. 640.

In an action against the receiver of an insolvent bank to compel specific performance of an oral agreement by the bank to convey lands to plaintiff, under which the latter had entered into possession and made valuable improvements, plaintiff was entitled to have a sum standing to his credit as a depositor with the bank, credited to purchase price.

Hughitt v. Hayes, 136 N. Y. 163.

Where claims in the eye of a court of equity will be regarded as due. *Id.*

Where a person doing business under a firm name had accepted drafts, and a partnership was formed under the same name, composed of the former proprietor of the business and another, and the former paid the drafts from the moneys of the firm, *held* that the firm, being in the hands of a receiver, he could not set-off the amount of the drafts so paid against a debt due.

Newhall v. Wyatt, 139 N. Y. 452.

Settlement; *See Accord and Satisfaction*; *Compromise*; *Release*.

Sewers; *See Municipal Corporations*.

When the petition for the condemnation of lands for sewers, under Laws 1887, chapter 609, should be granted.

Matter of Long, affirmed without opinion, 128 N. Y. 596.

Sheriff; *See Attachment*; *Bail*; *Escape*; *Execution*.

Deputy sheriff is a peace officer of the county; his fees belong to him alone.

Deyoe v. Woodworth, 144 N. Y. 448.

Liability of surety of deputy sheriff; what is misfeasance of such deputy.

Flack v. Brassel, 153 N. Y. 621.

Notice by a surety will not operate as a discharge until time has elapsed in which a new bond might be given.

Reilly v. Dodge, 131 N. Y. 153.

In the absence of bad faith the sheriff may entrust new business to such deputy without discharging the sureties. *Id.*

It is not required that such notice be served at the office. *Id.*

Ships and Vessels; *See Carriers*; *Demurrage*; *Freight*; *Naviga-
tion*.

The mere fact that the vessel is navigated by unlicensed pilot is not sufficient to deem such vessel unseaworthy.

Tebo v. Jordan, 147 N. Y. 387.

Ships and Vessels—Continued.

Failure of one vessel which has signaled and has not received answer, to slacken speed, constitutes contributory negligence as matter of law.

New York Harbor Towboat Co. v. N. Y., L. E. & W. R. R. Co., 148 N. Y. 574.

Neither party can recover in common-law actions for maritime torts where both vessels are at fault. *Id.*

The power of ship's husband, as such, to borrow money is based upon present and pressing necessity.

Chase v. McLean, 130 N. Y. 529.

A loan used in paying a debt contracted for supplies three years before is not within this rule. *Id.*

Master had no authority to borrow for such purpose. *Id.*

Where a vessel is lost through the negligence of a joint owner, he is liable to his co-owners for such loss.

Williams v. Hays, 143 N. Y. 442.

Where the insurance on such a vessel is paid to one of the joint owners, the owner through whose negligence it occurred is liable for such amount. *Id.*

Slander ; *See Libel and Slander.*

Societies ; *See Associations ; Benevolent Associations ; Insurance ; Religious Associations.*

Soldiers ; *See Military.*

Special Proceedings ; *See Practice.*

Special Verdict ; *See Practice.*

Specific Performance ; *See Contracts ; Equity ; Reformation of Instruments ; Statute of Frauds ; Vendor and Purchaser.*

Time of performance may be made essential to relief.

Schmidt v. Reed, 132 N. Y. 108.

When not so done, either party may render time of performance as of essence upon notice to the other. *Id.*

Failure to convey according to terms of agreement entitles purchaser to recover back his advance payment. *Id.*

Equity will enforce a parol contract for an interest in land when it is certain and definite. *Crosdale v. Lanigan*, 129 N. Y. 604.

Where the title of the seller is depended upon to resist performance, proof of valid title will entitle the agreement to be enforced. *Aldrich v. Bailey*, 132 N. Y. 85.

An action for damages in lieu of specific performance of a contract for the conveyance of land is barred if, when it was com-

Specific Performance—Continued.

menced, the ten years limitation provided for actions in equity had run against the cause of action for specific performance.

Cooley v. Lobdell, 153 N. Y. 596.

Where the defendant has put it out of his power to perform by conveying to other persons, the plaintiff, on proving his right, is entitled to the property. *Id.*

When specific performance to compel sale of land should not be decreed. *Kahn v. Chapin*, 152 N. Y. 305.

When damages for breach of covenants will be allowed in an action for specific performance.

O'Beirne v. Alleghany & Kinzua R. R. Co., 151 N. Y. 372.

When purchaser of land may by his conduct waive a literal performance of an agreement to convey land free from incumbrances and place himself in a position where an allowance out of the purchase money is all he can equitably demand.

Webster v. Kings County Trust Co., 145 N. Y. 275.

Tender on the trial of an action for specific performance and deposit with the clerk of the court of a deed executed by all the vendors is a good delivery in escrow, which is not defeated by the death of one of the vendors before its actual delivery to the purchaser. *Id.*

What facts must exist to authorize a court to decree a specific performance of a contract. *Stokes v. Stokes*, 148 N. Y. 708.

When specific performance of a contract for the purchase of land will not be decreed. *McPherson v. Schade*, 149 N. Y. 16.

When specific performance of a contract in relation to property may be decreed. *Williams v. Montgomery*, 148 N. Y. 519.

Where a grantee receives a deed as security for a loan, with full covenants and warranty, he cannot be compelled to re-convey in fee simple as the deed was in effect simply a mortgage.

Shields v. Russell, 142 N. Y. 290.

A grantee is not excused from executing a re-conveyance by the fact that it is claimed by the assignee of the lease. *Id.*

When specific performance of a contract will not be refused on the ground that there is a change of conditions.

Prospect Park and Coney Island R. R. Co. v. C. I. & B. R. R. Co., 144 N. Y. 152.

Specific performance was properly decreed of an agreement to assign mortgage in place of worthless one as part payment of land. *Roberge v. Winnie*, 144 N. Y. 709.

Where a *lis pendens* is filed against property which the defendant agreed to sell, and the suit is dismissed, specific performance of contract to sell will be decreed.

Haffey v. Lynch, 143 N. Y. 241.

The plaintiff is not bound to accept a deed which defendant declared would convey an incumbered title. *Id.*

Where the evidence in a trial court clearly establishes the terms

Specific Performance—Continued.

- of a parol agreement to convey land, the finding is binding on the appellate court. *Dunckel v. Dunckel*, 141 N. Y. 427.
- Where equity courts violate no fixed rules in decreeing specific performance, their discretion is not reviewable on appeal. *Id.*
- Where the consideration has been paid and possession, taken the specific performance of a contract of sale will be decreed. *Id.*
- After sufficient part performance of an oral agreement it is enforceable in equity. *Murphy v. Whitney*, 140 N. Y. 541.
- When in an action for specific performance between vendor and purchaser the court will decree specific performance against the purchaser. *Holly v. Hirsch*, 135 N. Y. 590.
- It seems* that in enforcing purchases at judicial sales, the court will often exercise its discretion in favor of the purchaser if there are questions affecting the title. *Id.*
- When in an action for specific performance of a contract to sell real estate to plaintiff free from incumbrance, specific performance would be refused. *Gotthelf v. Stranahan*, 138 N. Y. 345.
- Circumstances under which judgment adjudging plaintiff to be the equitable owner of one-third of the homestead property and that defendant convey the same to her was proper. *Center v. Weed*, 138 N. Y. 532.
- A court of equity will compel the vendor to execute another deed when first is lost, so as to clothe the purchaser with the record title. *Kent v. Church of St. Michael*, 136 N. Y. 10.
- Where the original vendor is dead, and the title by the terms of his will is vested in certain parties whose interests are subject to be opened and let in after-born children, a conveyance by direction of a judgment, to which all the living persons in interest are parties, will be effectual to perfect the title. *Id.*
- Will not be decreed when all the parties are not before the court and title depends upon facts outside the record. *Dingley v. Bon*, 130 N. Y. 607.
- Facts tending to establish vendor's title will be considered. *Kelly v. Brower*, 132 N. Y. 539.

Stare Decisis ; *See Former Adjudication.*

State ; *See Canals ; Constitutional Law ; Escheat ; Patent for Land.*

Duties of commissioners of land office are of a judicial character, and cannot be enforced by *mandamus*.

People ex rel. Harris v. Commissioners of Land Office, 149 N. Y. 26.

In a claim against state, it subjects the determination of its liability to those rules which usually obtain between employer and employed. *Gates v. State of N. Y.*, 128 N. Y. 221.

Measure of damages in case of injury to building by leakage of water from canals determined. *Slavin v. State*, 152 N. Y. 45.

State—Continued.

Chapter 380, Laws 1889, as to wages of workmen on public works in the state, does not include laborers in the penal, reformatory, eleemosynary or educational institutions of the state.

Drake v. State, 144 N. Y. 414.

Where franchises sought to be conferred on a corporation are taken away by a repealing act after payment by the corporation, a claim lies against the state for the amount so paid.

Coxe v. State, 144 N. Y. 396.

Power given by the legislature to a particular body to hear a claim against the state is not taken away by a general statute in relation to the hearing of similar claims. *Id.*

Liability of state for appropriation in 1843 of the waters of Skaneateles Lake. Rights of riparian owners.

Waller v. State, 144 N. Y. 579.

The unjust refusal of the board of managers of a state institution to give a certificate gives the contractor right to prosecute his claim before the state board of audit.

Peck v. State, 137 N. Y. 372.

The owner of a diseased animal which has been killed in pursuance of chapter 661, Laws 1893, is entitled to its actual value in its diseased condition.

Tappen v. State, 146 N. Y. 44.

The United States lays no claim to the low flat lands outside the channel of deep navigable rivers.

Rumsey v. N. Y. & New England R. R. Co., 130 N. Y. 88.

The state cannot be held liable in any cause save by its own consent.

Locke v. State of N. Y., 140 N. Y. 480.

Where the compensation of a state employe is fixed by statute, it cannot be reduced by the person under whom he is employed.

Clark v. State of N. Y., 142 N. Y. 101.

The fact that an employe takes the reduced compensation will not estop him from subsequently claiming the residue. *Id.*

But a statute fixing such compensation would not affect an existing contract. *Id.*

Statutes ; See Constitutional Laws ; Foreign Laws ; Penalties.

I. ENACTMENT.

II. CONSTRUCTION.

1. *Generally.*

2. *Of Penal Statutes.*

3. *Of Particular Statutes.*

III. REPEAL.

I. ENACTMENT.

The act to authorize the drainage of marsh lands (chapter 844, Laws 1868), was repugnant to the provision of the Constitution giving Congress exclusive power to regulate commerce.

Coxe v. State, 144 N. Y. 396.

Statutes—Continued.

The scope of section 18, article 3 of the Constitution, prohibiting the passage of private or local bills granting to any corporation or association or individual the right to lay down railroad tracks,—considered.

Sun Printing & Pub. Assn. v. Mayor, 152 N. Y. 257.

A statute is presumed to take effect at the commencement of the day on which it was proved.

Croveno v. Atlantic Ave. R. R. Co., 150 N. Y. 225.

The legislature may authorize the sale of infants' real property.

Ebling v. Dreyer, 149 N. Y. 460.

When a special statute for the sale of infants' real estate is not invalidated. *Id.*

When a statute amends a former statute "so as to read as follows," it operates as a repeal by implication of inconsistent provisions in the former law, and of provisions omitted in the amended law. Where the amended act re-enacts provisions in the former law, the law will be regarded as having been continuous.

Matter of Prime, 136 N. Y. 347.

A statute takes effect, although in form the amendment of a statute which has been in effect repealed.

People ex rel. Strough v. County Canvassers of Jefferson, 143 N. Y. 84.

Statute authorizing the granting of land under water requires the assent of two-thirds the members of the legislature.

Rumsey v. N. Y. & New England R. R. Co., 130 N. Y. 88.

Section 13 of the Liquor Tax Law of 1896 for the division of moneys collected between state and city did not require two-thirds vote of the legislature.

People ex rel. Einsfeld v. Murray, 149 N. Y. 367.

The Liquor Tax Law is not unconstitutional because it does not follow the classifications of the city laid down in the Constitution. *Id.*

The Liquor Tax Law is not a special city act. *Id.*

The fact that an act which has been amended is again amended by reference only to the original act will not render the last amendment nugatory.

White v. Inebriates' Home for Kings Co., 141 N. Y. 123.

II. CONSTRUCTION.**1. Generally.**

A statute passed at the same session of the legislature may be considered to ascertain the intention of the legislature in regard to another statute.

Bank of the Metropolis v. Faber, 150 N. Y. 200.

Journals of the house are admissible to show the vote by which the bill was passed.

New York & Long Island Bridge Co. v. Smith, 148 N. Y. 540.

Statutes—Continued.

A state court should, in construing an Act of Congress, follow the instructions given by the United States Supreme Court.

Yorke v. Conde, 147 N. Y. 486.

The provision of the Constitution prohibiting the limit of recovery in actions for injuries resulting in death is not retrospective.

Isola v. Weber, 147 N. Y. 329.

If the statute and the Constitution can be construed so as to enable both to stand, and each be given a legitimate effect, it is the duty of the court to adopt such construction.

People v. Rosenberg, 138 N. Y. 410.

An act is not to be determined as to its constitutionality by the manner in which its provisions may be carried out.

People ex rel. Nechamcus v. Warden of City Prison, 144 N. Y. 529.

Statute changing procedure applies to actions pending at the time it takes effect, unless specially excepted.

Lazarus v. Metropolitan El. R. R. Co., 145 N. Y. 581.

The language used must be given its obvious meaning.

Matter of Manning, appeal dismissed, 139 N. Y. 446.

Where the act to be done concerns public interest or individual rights, permissive words conferring power or authority will be held to be mandatory.

People ex rel. Reynolds v. Common Council of Buffalo, 140 N. Y. 300.

Permissive words in a statute should be construed as mandatory, only where the statute taken as a whole and viewed in the light of surrounding circumstances indicates a legislative intent that they should be so construed.

People ex rel. Comstock v. Mayor, etc., of Syracuse, affirmed on opinion below in 128 N. Y. 632.

The Statute of Uses and Trusts is to be construed literally.

Cochrane v. Schell, 140 N. Y. 516.

All the provisions of a statute must be consulted to ascertain the legislative intent.

People ex rel. Huntington v. Crennan, 141 N. Y. 239.

Method of interpreting a statute considered.

Karst v. Gane, 136 N. Y. 316.

An original statute with all its amendments must be read together and viewed as one act passed at the same time.

Lyon v. Manhattan Ry. Co., 142 N. Y. 298.

In the construction of a statute, the intent of the framers is to be sought.

Matter of Board of Street Opening, 133 N. Y. 329.

A construction of a statute should be avoided which would injuriously affect the rights of others.

Suburban Rapid Transit Co. v. Mayor, etc., of N. Y., 128 N. Y. 510.

Statutes—*Continued.*

In the absence of contrary intent, all statutes are to be construed as prospective.

Matter of Delaware & Hudson Canal Co., 129 N. Y. 105.

Where a particular intention, incompatible with a general intention, is expressed, the former is considered in the nature of an exception.

Hoey v. Gilroy, 129 N. Y. 132.

Only when required by the most cogent reasons will an act of the legislature be declared void.

Waterloo Woolen Mfg. Co. v. Shanahan, 128 N. Y. 345.

When the legislature appropriates public money for an improvement, the courts may inquire whether the improvement is for a purpose which is public, and if bill was passed by requisite vote of legislature.

Id.

A provision of statute will not be considered retroactive where such construction will destroy all remedy.

Matter of Trustees of Union College, 129 N. Y. 308.

An affirmative statute is directory merely, and leaves the common law in force.

Dutchess Co. Mut. Ins. Co. v. Van Wagoner, 132 N. Y. 398.

A statute of a state granting powers and privileges to corporations, must be held to apply only to corporations created by the state.

Matter of Prime, 136 N. Y. 347.

It seems, however, that a general law of the state prohibiting corporations from exercising particular powers will operate upon foreign corporations.

Id.

Where an act conveys special franchises and privileges, its language must be construed most favorably to the people.

People v. Broadway R. R. Co., 126 N. Y. 29.

The conduct under the act which is claimed to constitute the forfeiture of corporate rights and franchises is to have a charitable and liberal construction.

Id.

Courts cannot by construction cure a *casus omisus*.

McKuskie v. Hendrickson, 128 N. Y. 555.

2. Of Penal Statutes.

The provision of section 4 of chapter 515, Laws 1889, prohibiting the manufacture, etc., of any vinegar containing any artificial coloring, is not unconstitutional.

People v. Girard, 145 N. Y. 105.

Where an offense is defined in the same language as was employed before, it will be presumed that no change was intended.

People v. Fanshawe, 137 N. Y. 68.

Chapter 602, Laws 1892, in relation to the examination and registration of employing or master plumbers, declared constitutional.

People ex. rel. Nechamcus v. Warden of City Prison, 144 N. Y. 529.

Statutes—Continued.

Chapter 572 of 1895, amending section 351 of the Penal Code, and making pool selling a felony, is not unconstitutional.

People ex rel. Weaver v. Van De Carr, 150 N. Y. 439.

Chapter 572 of 1895 may be treated as a separate statute from chapter 570, 571 and 573 of the same year. *Id.*

3. Of Particular Statutes.

Chapter 679 of 1886, exempting bank stock held by foreign insurance companies doing business in this state from taxation, did not apply to the taxation for the year 1886.

Etna Ins. Co. v. Mayor, 153 N. Y. 331.

The provisions of Law 1886 (chap. 656, § 10), requiring any action to test the validity of a tax in Long Island City to be brought within one year, *held*, not to have a retroactive effect.

Van Deventer v. Long Island City, 139 N. Y. 133.

The provisions of the statute exempting the cities of New York and Brooklyn from liability for accidents on the Brooklyn bridge, are not retroactive.

Reid v. Mayor, etc., of N. Y., affirmed, 139 N. Y. 534.

Section 27 of the Statutory Construction Law does not materially change the rule for computing time.

People v. Burgess, 153 N. Y. 561.

Where an act is required to be done a certain number of days before a specified event, the day of such event is to be excluded, and that when the act is performed included. *Id.*

A receiver in supplementary proceedings has no power to determine whether a fund in his hands belongs to certain creditors.

Matter of Hone, 153 N. Y. 522.

When chapter 344 of 1893, extending term of sole commissioner of highways, becomes operative.

People ex rel. Lovett v. Randall, 151 N. Y. 497.

Chapter 148 of 1893, which attempts to validate an illegal resolution of the Supervisors of Essex County, changing the county seat, is unconstitutional. *Williams v. Boynton*, 147 N. Y. 426.

The Statutory Construction Law cannot affect a vested right.

Hall v. Brennan, 140 N. Y. 409.

The forest commission has been a continuous body since its creation under the act of 1885.

People ex rel. Forest Commission v. Campbell, 152 N. Y. 51.

The city of New York must pay its quota of state tax imposed by chapter 214 and 565 of 1893 for the care of the insane poor.

People v. Fitch, 148 N. Y. 71.

The Liquor Tax Law of 1896 is not a Tax Law.

People ex rel. Einsfeld v. Murray, 149 N. Y. 367.

Chapter 182 of 1884, in regard to the compensation of policemen in a city over 800,000,—applied.

Stack v. City of Brooklyn, 150 N. Y. 335.

Statutes—Continued.

When section 4 of the Statutory Construction Act applies.

Matter of Bronson, 150 N. Y. 1.

Chapter 344 of 1893, extending term of office of town clerks, does not apply to the office of town clerk elected the day previous to the passage of said law.

People ex rel. Le Roy v. Foley, 148 N. Y. 677.

Chapter 344 of 1895, providing that applicant for position is an honorably discharged soldier or sailor of the late war, etc., is in conflict with section 9 of article 5 of the Constitution.

Matter of Keymer, 148 N. Y. 219.

Date of taking effect of chapter 520, Laws 1893, changing the compensation of the clerk of Onondaga county from fees to a salary.

People ex rel. Onondaga County Savgs. Bank v. Butler, 147 N. Y. 164.

Chapter 823 of 1895, prohibiting the carrying on of barbering on Sunday, is unconstitutional. *People v. Hawnor*, 149 N. Y. 195.

Chapter 427 of 1896 (The Albany Police Law) is unconstitutional.

Rathbone v. Wirth, 150 N. Y. 459.

The amendment of 1896 to section 191 of the Code-restricting appeals to the Court of Appeals, was a competent exercise of legislative power.

Sciolina v. Erie Preserving Co., 151 N. Y. 50.

Chapter 601, Laws 1895, abolishing the office of police justice in New York city is not violative of section 22 of article 6 of the Constitution.

Koch v. Mayor, 152 N. Y. 72.

The Rapid Transit Acts do not contravene the provisions of article 8, section 10, or article 3, section 18 of the Constitution, and are valid.

Sun Printing & Pub. Ass'n v. Mayor, 152 N. Y. 257.

The Rapid Transit Acts do not contemplate or permit a lease in perpetuity. *Id.*

Chapter 934, Laws 1895, annexed district (Westchester county), created by districts, and divisions thereof determined.

People ex rel. Henderson v. Supervisors of Westchester County, 147 N. Y. 1.

Chapter 934, Laws 1895, annexing a portion of the county of Westchester to the city and county of New York is constitutional. *Id.*

Chapter 428, Laws 1885, authorizing the audit by the Board of Claims of the claim of the county of Cayuga for reimbursements of expenses for the trials of certain convicts for crimes committed in state prison, is not unconstitutional.

Board of Supervisors of Cayuga Co. v. State, 153 N. Y. 279.

Chapter 428 of 1885 validated the claim referred to, subject to the adjustment of the amount by the Board of Claims. *Id.*

Chapter 710, Laws 1892,—construed.

People ex rel. Dobson v. Fire Comrs. of Brooklyn, 146 N. Y. 357.

Statutes—Continued.

III. REPEAL.

Section 30 of chapter 564 of 1890, making directors of a business corporation liable for debts for failure to file annual reports, was not repealed by chapter 2 of 1892.

Bank v. Faber, 150 N. Y. 200.

The rule that General Acts should be construed as not repealing or affecting the provisions of charters of municipal corporations does not apply when intent of legislature is clearly to the contrary.

People ex rel. Dobson v. Fire Comrs. of Brooklyn, 146 N. Y. 357.

When power conferred by the legislature on a public body for a special purpose is not impliedly repealed.

Coxe v. State, 144 N. Y. 396.

Repeal of a repealing act restores the original act.

Chard v. Holt, 136 N. Y. 30.

The repeal of a statute by implication is not favored, and when some office or function can, by fair construction, be assigned to both acts, and they confer different powers, to be exercised for different purposes, both must stand.

Woods v. Supervisors of Madison, 136 N. Y. 403.

A statute which is amended and re-enacted, so as to read as prescribed in the later amendatory statute, is thereby wholly annulled; and when such amendatory act is itself repealed, the original act is not revived. *People v. Wilmerding*, 136 N. Y. 363.

A mere legislative intent to revive the earlier act is not alone sufficient to accomplish that purpose. *Id.*

The fact that by subsequent legislation it appears that the legislature believed that the original act was still in force will not have the force of an enactment. *Id.*

Special and local laws are not repealed by a general statute unless the intent to do so is clearly manifest.

James v. Sammis, 132 N. Y. 239.

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415		129 N. Y.	312	466		129 N. Y.	1
482		133 N. Y.	485	466	2	132 N. Y.	400
482		133 N. Y.	488	466	3	130 N. Y.	597
482	subd. 5	133 N. Y.	488	466		140 N. Y.	99
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409	312	135 N. Y.	231	410		153 N. Y.	629
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Statute of Frauds ; *See Contracts ; Fraud ; Fraudulent Conveyances ; Promise ; Sales ; Specific Performance ; Trusts ; Vendor and Purchaser.*

I. EFFECT OF.

II. SALES OF LAND.

III. PROMISE TO PAY DEBT OF ANOTHER.

I. EFFECT OF.

A parol promise by the owners of the building to the material-man to see him paid if contractor failed so to do, is an original promise. *Raabe v. Squier*, 148 N. Y. 81.

An agent who simply transmits to principal the offer of the third party does not act for such party, and his letter is not sufficient memorandum to satisfy Statute of Frauds.

Wilson v. Lewiston Mill Co., 150 N. Y. 314.

II. SALES OF LAND.

When land is given under a parol promise to convey the same, after the making of permanent improvements upon the faith of such promise, there is such part performance that the Statute of Frauds will not apply. *Young v. Overbaugh*, 145 N. Y. 158.

What is not sufficient to take a parol agreement for sale of land out of the Statute of Frauds. *Cooley v. Lobdell*, 153 N. Y. 596.

Payment of a consideration is not alone sufficient to take a parol agreement for sale of real estate out of the statute. *Id.*

Improvements must be substantial and permanent to take agreements out of the statute. *Id.*

Residence by a married woman with her husband is not such possession of the premises as will authorize an enforcement of his parol agreement to convey them to her. *Id.*

Statute of Frauds—Continued.

When a word of large import is not to be restricted in scope or meaning. *Palmer v. Van Santvoord*, 153 N. Y. 612.

The word "employe" in chapter 376 of 1885, giving preference to wages of employes,—defined. *Id.*

III. PROMISE TO PAY DEBT OF ANOTHER.

An oral promise to indemnify for becoming indorser on a note of a third person is not within the Statute of Frauds.

Jones v. Bacon, 145 N. Y. 446.

An agreement to give a mortgage as security for the repayment of advances made on the faith thereof need not be in writing.

Sprague v. Cochran, 144 N. Y. 104.

When transferee expressly promises the creditor to make payment after receipt of property from debtor, such promise is original and not within the Statute of Frauds.

First Nat. Bk. of Sing Sing v. Chalmers, 144 N. Y. 432.

Statute of Limitations; See Adverse Possession.

I. NATURE OF, AND WHEN IT BEGINS TO RUN.

II. WHAT TIMES LIMITED.

III. DISABILITIES AND WHAT REMOVES BAR.

I. NATURE OF, AND WHEN IT BEGINS TO RUN.

When a cause of action by a surviving partner for contribution toward the expenses of an attempted enforcement of a debt due the partnership secured by a mortgage on real property, accrues. *Preston v. Fitch*, 137 N. Y. 41.

A cause of action against a county for misappropriation of railroad taxes, which should have been applied to the purchase of town bonds, arises when the misappropriation is made by the county treasurer.

Kilbourne v. Supervisors of Sullivan, 137 N. Y. 170.

A claim filed in the Board of Claims in 1890 for work and materials furnished before 1878, under a contract with the board of managers of a state institution made in 1872, is barred by Laws 1883, chapter 205, section 7. *Peck v. State*, 137 N. Y. 372.

The effect of Laws 1868, chapter 594, is to suspend the running of the Statute of Limitations against the claim of an executor against his testator until the first accounting, similar to Code Civil Procedure (§ 2740).

O'Flynn v. Powers, 136 N. Y. 412.

Generally the obligation of a trustee to account is not affected by the statute until a denial or repudiation of the trust.

Zebley v. Farmers' Loan & Trust Co., 139 N. Y. 461.

When statute begins to run to receive moneys paid at invalid tax

Statute of Limitations—Continued.

- sales in the city of Albany, under chapter 86 of 1850, article 6, section 52. *Reid v. Supervisors of Albany*, 128 N. Y. 364.
- The amendment of Laws 1850, chapter 86, article 652, by Laws 1889, chapter 429, is prospective in its operation and the Code limitations govern past cases. *Id.*
- It seems* the legislature could, however, have made the amendment applicable to past sales, under certain conditions. *Id.*
- The limitation imposed by section 14, article 3 of the Constitution upon the audit and payment of claims does not begin to run until a tribunal has been constituted to hear them.
- Board of Supervisors of Cayuga Co. v. State*, 153 N. Y. 279.
- Right to bring an action accrues only when an interest has vested. *Cooper v. U. S. Mut. Benefit Assoc.*, 132 N. Y. 334.
- Failure to inquire into circumstances which suggest fraud makes parties so failing chargeable with knowledge of fraud, and from then statute begins to run.
- Higgins v. Crouse*, 147 N. Y. 411.
- An investor is not chargeable with fraud because he fails to investigate affairs of concern that has failed. *Id.*
- When the Statute of Limitations begins to run in a case where a deed is so ambiguous on its face that it does not necessarily include more land than was intended to be conveyed.
- De Forest v. Walters*, 153 N. Y. 229.
- When Statute of Limitations commences to run in favor of residuary legatee. *Gilbert v. Taylor*, 148 N. Y. 298.
- What absence of debtor from state is sufficient to suspend running of statute under section 401 of the Code.
- Hart v. Kip*, 148 N. Y. 306.
- What is not a judgment within the meaning of section 376 of the Code. *Sheldon v. Mirick*, 144 N. Y. 498.
- Where the finding establishes a trust fund, the statute does not affect a claim against estate of trustee.
- Sheldon v. Sheldon*, 133 N. Y. 1.
- Evidence that the husband received the money upon an agreement to pay it to his wife upon request does not prevent claim from being barred. *Id.*
- An action against the receiver of a corporation in form upon notes made by it, but in reality to determine whether the plaintiff is a creditor, is not barred by the Statute of Limitations where an action on a note was not barred at the time of dissolution.
- Ludington v. Thompson*, 153 N. Y. 499.
- Where the complaint in an action upon town bonds is ambiguous in counting not only on the bonds, but, in case they are found invalid, upon an implied contract for repayment of the money loaned, a plea of the Statute of Limitations furnishes a good defense to the latter cause of action.
- Smith v. Town of Greenwich*, 145 N. Y. 649.

Statute of Limitations—Continued.

There is no limit to an action for a continuing trespass, either in law or equity, short of the twenty years for which a grant is presumed.

Knox v. Metropolitan El. R. Co., affirmed without opinion in 128 N. Y. 625.

The Statute of Limitations does not run against the maintenance of a railroad in violation of plaintiff's easements in the highway.

Doyle v. Manhattan El. R. R. Co., reversed on other grounds, 128 N. Y. 488.

When the statute begins to run in an action for specific performance of a contract to convey a house and lot.

Cooley v. Lobdell, 153 N. Y. 596.

Neither a change of ownership of a cause of action nor a subsequent demand will arrest the running of the statute. *Id.*

The words "rules of limitation," as used in section 414 of the Code,—construed.

Hayden v. Pierce, 144 N. Y. 512.

When an action upon a claim against an estate, after its rejection, is not barred by the statute. *Id.*

Where a demand is necessary, the statute operates from the time when the right to make the demand was complete.

People ex rel. Best v. Preston, 131 N. Y. 644.

A bank examiner's right begins when he has completed his work. *Id.*

The provision of the former Code that the cause of action should not be deemed to have accrued until the discovery of the fraud is only applicable to cases solely cognizable by the Court of Chancery.

Mason v. Henry, 152 N. Y. 529.

When statute begins to run to collect certificates of indebtedness of cemetery association issued on certain conditions.

Thacher v. Hope Cemetery Asso., 126 N. Y. 507.

Such action would be at law and within the six years' statute. *Id.*

When lapse of six years has barred right of action for trespass, new causes of action arise for new trespasses.

Galway v. Metropolitan Elevated Ry. Co., 128 N. Y. 132.

Continuance and operation of railroad gives right of action, though it has not been asserted for ten years. *Id.*

The short Statute of Limitations cannot be evaded by successive presentations of the same claims.

Titus v. Poole, 145 N. Y. 414.

What action may be begun within the saving provision of section 405 of the Code, and is not barred. *Id.*

A right of action for an accounting arises after expiration of a reasonable time since dissolution of partnership.

Gilmore v. Ham, 142 N. Y. 1.

The right of action of a partner accrues when the liquidating partner has wound up the partnership affairs. *Id.*

Statute of Limitations—Continued.

Whether such action must be brought within six or ten years,—
quære. *Id.*

The rule that the statute does not run in favor of a trustee until he openly repudiates the trust refers only to direct trusts. *Id.*

Upon dissolution a cause of action does not arise until a final settlement is possible by both partners, who act as liquidators.
Gray v. Green, 142 N. Y. 316.

Where a wife joins in a conveyance with her husband who agreed to pay her a portion of the consideration, a right of action without demand arises in her favor when he receives the consideration.
Riley v. Riley, 141 N. Y. 409.

Where an attempt is made to commence an action before the time has expired, and service is prevented by death of the party, the statute is suspended for eighteen months. *Id.*

A statute which shortens, as to existing claims, the Statute of Limitations, is only valid when a reasonable time is left in which a party may commence his action.

Parmenter v. State of N. Y., 135 N. Y. 154.

Where the right to present a claim against the state, which was previously unlimited in time, is by a statute curtailed to a period less than eight weeks after the passage of the act, a reasonable time is not left. *Id.*

The subsequent passage of an act by which a few days over three months after its passage is permitted to a claimant in which to file his claim, will not of itself provide a reasonable time. *Id.*

No demand is necessary before suing an attorney in fact for money collected.
Wood v. Young, 141 N. Y. 211.

The right of action accrues against an attorney at law when the client has knowledge of the fact entitling him to make a demand. *Id.*

The part payment must be made on account of the debt for which the action is brought. *Crow v. Gleason*, 141 N. Y. 489.

Mere naked payment will be of no avail under the statute. *Id.*

In order to revive a debt, a part payment must be shown to have been made on that debt. *Adams v. Olin*, 140 N. Y. 150.

An account kept by a husband of his transactions with his wife's money does not constitute a mutual account. *Id.*

II. WHAT TIMES LIMITED.

An action in behalf of a town against the county for misappropriation and diversion of taxes collected from a railroad, in aid of which the town was bonded, must be brought within six years.
Woods v. Supervisors of Madison, 136 N. Y. 403.

Action to recover should be brought within ten years after the death of holder.
Dodge v. Gallatin, 130 N. Y. 117.

Section 382 subdivisions 2 and 3 of the Code does not apply to a

Statute of Limitations—Continued.

proceeding by an owner to recover compensation, where the public authorities have taken no steps to ascertain the damages.

Matter of Clark v. Water Comrs. of Amsterdam, 148 N. Y. 1.

The rule that payments made upon an account will be deemed applied on the earlier items, may be used to relieve an action upon the account from the bar of the Statute of Limitations when items were received more than six years before the action.

Nostrand v. Ditmis, 127 N. Y. 355.

Under section 1844 of the Code, the three years which must elapse before an action can be maintained against an heir, are not part of the time limited for the commencement of such an action.

Adams v. Fassett, 149 N. Y. 61.

The limitations of two years prescribed by section 5057 United States Revised Statutes in actions by or against an assignee in bankruptcy applied only to disputes which existed at the time of the bankruptcy.

Bowen v. D. L., & W. R. R. Co., 153 N. Y. 476.

Mortgage given to secure payment of notes can be foreclosed by action brought at any time within twenty years.

Hulbert v. Clark, 128 N. Y. 295.

The ten years' Statute of Limitations applies to a proceeding under section 2606 of the Code, brought by an administrator *de bonis non* to compel the personal representative of deceased to account.

Matter of Rogers, 153 N. Y. 316.

The six months' Statute of Limitations does not apply to an action of redemption brought by the remainderman in a case where the landlord had proceeded solely against the life-tenant.

Sand v. Church, 152 N. Y. 174.

In a case of which before the Code equity would have exclusive jurisdiction, the ten years' limitation applies.

Gallup v. Bernd, 132 N. Y. 370.

Statute cannot be set up where there is no remedy at law. *Id.*

In absence of any agreement, an action for return of property delivered is barred after six years.

Adams v. Olin, 140 N. Y. 150.

III. DISABILITIES, AND WHAT REMOVES, BAR.

A resident of this state who merely travels abroad for pleasure does not acquire a residence without the state.

Hart v. Kip, 148 N. Y. 306.

When the plaintiff has the burden of showing, the running of the statute was suspended.

Mason v. Henry, 152 N. Y. 529.

An action by a receiver of an insolvent corporation against its directors for misapplication of assets, where the cause of action accrued before the new Code took effect, and the action was brought before September 1, 1879, is within the six years' Statute of Limitations of the old Code. *Id.*

Statute of Limitations—Continued.

In such case the statute runs from the date of the misapplication of the funds, and not from the time it was discovered. *Id.*
 An owner has a right to invoke the aid of a court of equity at any time while he is the owner to have an apparent incumbrance discharged from the record, and this right is never barred by the Statute of Limitations. *Smith v. Reid*, 134 N. Y. 568.
 Statutes relating to are applicable to persons under disabilities unless excepted. *Levy v. Newman*, 130 N. Y. 11.

Where second application was made to avoid an assessment eighteen years after the first, it was barred.

Matter of Druffy, 133 N. Y. 512.
 An action brought by the Seneca nation of Indians under the authority of Laws 1845, chapter 150, is, not affected by question whether an Indian title can be barred by adverse possession or by state Statute of Limitations.

Seneca Nation of Indians v. Christie, 126 N. Y. 122.
 A guardian, as to funds of ward must account to the ward upon the latter attaining his majority, and the Statute of Limitations does not bar an action for an accounting.

Matter of Camp, 126 N. Y. 377.
 When the facts do not constitute an equitable estoppel, no acquiescence for less than twenty years is a bar to an action by an adjoining property owner, to restrain the maintenance of an elevated railroad.

Knox v. Metropolitan El. R. R. Co., affirmed without opinion in 128 N. Y. 625.

The maintenance of a pond for many years in such condition as to constitute a nuisance is not a bar to recovery of penalty for its continuation.

Board of Health of Yonkers v. Copcutt, 140 N. Y. 12.
 The Statute of Limitations does not, after the prescribed period, destroy, discharge or pay the debt, but it simply bars a remedy thereon. *Hulbert v. Clark*, 128 N. Y. 295.

It seems the legislature could repeal the statute and then payment of a debt could be enforced by action. *Id.*

When judgment against a decedent has been obtained, even an offer to refer claim upon which judgment is based will not bring it within the Statute of Limitations.

Matter of Lyman, affirmed without opinion, 128 N. Y. 614.
 A payment by heirs of a mortgagor who had inherited a part of the mortgaged premises made to prevent a foreclosure of the mortgage, does not arrest the running of the statute against the lien of the mortgage upon another portion conveyed by the mortgagor. *Murdock v. Waterman*, 145 N. Y. 55.
 Where a party dies pending an action, the period of eighteen months must be added from the time of his death.

Hall v. Brennan, 140 N. Y. 409.

Statute of Limitations—Continued.

Whether a different rule must be applied under Statutory Construction Law defining meaning of term year,—query. *Id.*

Whether, in order to give the creditor the additional time of one year after the issuance of letters, where such letters are not issued at least six months before the expiration of time to bring the action, it is necessary that the letters should issue before the expiration of the time otherwise limited,—query. *Id.*

Six years after cause of action accrues a judgment creditor's action to set aside a conveyance is barred.

Weaver v. Haviland, 142 N. Y. 534.

The right of action does not accrue until recovery of judgment and return of execution unsatisfied. *Id.*

The cause of action is only deemed to have accrued in cases of fraud when the fraud is discovered after the right of action was perfect. *Id.*

Creditor's suit will not be barred by failure to bring an action which has since become barred. *Id.*

Stay ; See Practice.

An appeal direct to the United States Supreme Court from the decisions of a District Court judge at chambers cannot operate as a stay of execution of sentence in a capital case rendered in a State Court. *People v. Buchanan*, 146 N. Y. 264.

A court may stay proceedings on a money judgment.

Carter v. Hodge, 150 N. Y. 532.

Section 613 of the Code has no application to a temporary stay pending a motion in an ordinary action. *Id.*

An undertaking in the form prescribed for in a stay of execution given upon the payment from an order denying a motion for a new trial does not by itself stay proceedings. *Id.*

When stay should be vacated, when improperly granted on ground that another suit for same remedy was pending.

Dolbeer v. Stout, 139 N. Y. 486.

Steamboat Companies ; See Corporations.

When a steamboat company is liable to a passenger for loss by theft.

Adams v. New Jersey Steamboat Co., 151 N. Y. 163.

Stipulations ; See Practice.

When a town supervisor may stipulate to withdraw appeal and settle case, action of taxpayer to review action of supervisor considered. *Chase v. Defendorf*, 128 N. Y. 652.

When a stipulation as to the facts binds parties until litigation is ended. *Clason v. Baldwin*, 152 N. Y. 204.

Stipulations—Continued.

Effect of oral stipulations discussed and determined.

Mutual Life Ins. Co. v. O'Donnell, 146 N. Y. 275.

A stipulation authorizing plaintiff's attorney to serve an amended complaint authorizes only such an amendment as the court has power to grant.

Deyo v. Morss, 144 N. Y. 216.

A stipulation given to stay an injunction after a reversal of judgment may regulate proof on a new trial.

Hine v. New York El. R. R. Co., 149 N. Y. 154.

For what purpose judgment record on former trial is admissible.

Id.

Where the parties have stipulated to limit the controversy to a specific question, the courts cannot go beyond the range of inquiry thus defined.

Bleakley v. Sullivan, 140 N. Y. 175.

Where, in a criminal action, both the people and the accused stipulate as to the existence of certain facts, each is bound by the statement agreed upon.

People v. Cannon, 139 N. Y. 645.

Stipulation "that they or either of them will not institute or prosecute any proceedings to condemn the property described in the complaint herein, pending the stay granted by this order, and that they, and each of them, will contest the plaintiff's rights only in this action," *held*, to prevent condemnation proceedings.

Matter of Metropolitan Elevated Ry. Co., 136 N. Y. 500.

Stipulation withdrawing funds pending decision did not terminate the jurisdiction of the court over the fund.

Matter of City of Rochester, 136 N. Y. 83.

When General Term had power to relieve parties from effect of stipulation.

Tauziède v. Jumel, 138 N. Y. 431.

Stock and Stock Jobbing ; See Broker ; Corporations.

Certificates of stock have not the same quality of complete negotiability as commercial paper has.

Knox v. Eden Musee American Co., 148 N. Y. 441.

A manager who has received certificates of stock from the president of the corporation with instructions to cancel them cannot reissue them.

Id.

Although the officers of a corporation surrendered certificates for cancellation to a manager who disposes of them, they may challenge their validity in the hands of a *bona fide* purchaser.

Id.

The title of the true owner of a lost certificate may be ascertained against one who is a *bona fide* purchaser.

Id.

It is not a restraint on trade to make a reasonable regulation as to the mode of selling corporate stock.

Williams v. Montgomery, 148 N. Y. 519.

When a broker sued, and upon his own guarantee of his genuine-

Stock and Stock Jobbing—Continued.

ness of stock may recover from the company whose stock was sold.

Jarvis v. Manhattan Beach Co., 148 N. Y. 652.

The verdict of the jury upon the question of whether certain representations were made by a corporation is conclusive. *Id.*

For what act of an ostensible clerk in his office, a stockbroker is not liable.

Timpson v. Allen, 149 N. Y. 513.

Title of stock purchased for customer which is left as collateral security lies in him, subject to banker's lien.

Le Marchant v. Moore, 150 N. Y. 209.

Right of true owner of stock wrongfully pledged, considered.

Id.

Right of subsequent purchaser of the stock entitled to exchange upon payments cannot compel an exchange where prior right to exchange upon payment has not been accepted.

Dow v. Iowa Central Ry. Co., 144 N. Y. 426.

Date of taking effect of chapter 520, Laws 1893, changing the compensation of the clerk of Onondaga county from fees to a salary.

People ex rel. Onondaga County Savgs. Bk. v. Butler, 147 N. Y. 164.

Streets; *See Easements*; *Highways*; *Negligence*; *Municipal Corporations*.

Street Railways; *See Negligence*; *Railroads*; *Trespass*.

The mere fact that an electric street car was running at the rate of twelve or fifteen miles an hour in the absence of any law or ordinance does not constitute negligence as a matter of law.

Bittner v. Crosstown Street Ry. Co., 153 N. Y. 76.

The refusal to charge that a railway company was not liable for the motorman's error of judgment is error. *Id.*

A street railroad must obtain the consent both of the legal authorities and the property owners before it can apply to the courts to condemn the right to use the tracks of another company.

Colonial City Traction Co. v. Kingston City R. R. Co., 153 N. Y. 540.

Consents given by property owners to the construction and operation of a street railroad do not include the use of the tracks of another company. *Id.*

The provisions of Laws 1860, chapter 461, authorizing the Broadway Railway Company of Brooklyn to lay its track through certain streets,—construed.

People v. Broadway R. R. Co., 126 N. Y. 29.

The second clause of section 3 of the act relating respectively to the construction of the road in streets which were then opened and graded and those in streets, construed. *Id.*

Street Railways—Continued.

The fact that it would not have been profitable to build roads upon the various routes until each was opened to the final termination thereof, will not relieve the company from its duty of construction. *Id.*

Laws 1875, chapter 598, Laws 1879, chapter 350, and Laws 1882, chapter 405, extending the time of railroads which have been unable to construct their roads within the period specified in their charters, applied. *Id.*

Submission of Controversy ; See Practice.

Parties who ask for judgment upon an agreed statement of facts should state all those bearing upon the point to be decided.

Kneller v. Lang, 137 N. Y. 589.

Subpœna ; See Practice.**Subrogation ; See Mortgages ; Surety.**

Where a testamentary trustee has been charged with an amount of the trust fund misappropriated by a co-trustee with his knowledge, his right to have recourse to the individual share of the defaulting trustee is subordinate to that of a mortgagee who has foreclosed. *Drake v. Paige*, 127 N. Y. 562.

When sale of lands by defaulting trustee not considered a partition thereof. *Id.*

There is no principal in law or equity by reference to which a party who is the principal debtor can be regarded as subrogated to the right of his creditor by the payment of the debtor's own debt as agreed.

People ex rel. McMillan v. Supervisors of Cayuga, 136 N. Y. 281.

Right of preference of party who loaned money to an embarrassed corporation upon inadequate security, discussed and determined.

Farmers' Loan & Trust Co. v. Banker & Merchants' Tel. Co., 148 N. Y. 315.

A person redeeming from tax sales is not entitled to the subrogation as against one who claims title to the entire premises.

Koehler v. Hughes, 148 N. Y. 507.

Subrogation does not rest upon contract.

Pease v. Egan, 131 N. Y. 262.

A party who is compelled to pay the debt of a third party to protect his right, though contingent, may be subrogated. *Id.*

Where the mortgage is paid out of the personalty, the testator's legatees may be subrogated to the rights of the mortgagee. *Id.*

Subscription ; See Contracts ; Corporations.

Summary Proceedings.

The stay of summary proceedings provided by the amendment of Code Civil Procedure (§ 1310), on appeal from a judgment for rent, applies to proceedings pending when the act took effect.

People ex rel. Durant Land Improvement Co v. Jeroloman, affirmed in 139 N. Y. 14.

A valid judgment, regularly obtained by the landlord in summary proceedings to dispossess a tenant for non-payment of rent, is a bar to an action brought by the tenant against the landlord to cancel the lease between them, on the grounds that it was intended as a mortgage and was usurious.

Reich v. Cochran, 151 N. Y. 122.

Summons ; *See Practice.*

Sunday.

Chapter 823, Laws 1895, prohibiting the carrying on of barbering on Sunday is constitutional. *People v. Hawnor*, 149 N. Y. 195.

The legislature has authority to regulate the observance of the Sabbath. *People v. Moses*, 140 N. Y. 214.

Fishing on Sunday in a private pond near a public highway is a violation of Penal Code. *Id.*

Supervisors ; *See Counties ; Towns.*

The action of the board of supervisors in establishing a town fire district is legislative, and cannot be reviewed by *certiorari*.

People ex rel. O'Connor v. Board of Supervisors of Queens Co., 153 N. Y. 370.

Several petitions in regard to the same subject-matter, and alike except as to signers, may be considered that petition. *Id.*

Power of supervisor, irrespective of the direction of a town-meeting, to refuse or neglect to appeal from a judgment rendered against him as an officer. *Chase v. Defendorf*, 128 N. Y. 652.

The constitutional provision adopted in 1874 was designed to limit the power of the legislature in respect to the manner of electing supervisors by the vote of the electors.

People ex rel. McGrath v. Supervisors of Westchester, affirmed in 139 N. Y. 524.

A board of supervisors has power, by proper agreement, to waive the defense of the Statute of Limitations to a claim in favor of a town which is not already barred.

Woods v. Supervisors of Madison, 136 N. Y. 403.

Where, in the division of a county into assembly districts, the supervisors so constituted them as to make one containing 102,805 inhabitants, and another 31,685, with varying numbers intervening, *held*, that such action was in violation of the requirements of the Constitution.

Baird v. Supervisors of Kings, 138 N. Y. 95.

Supervisors—Continued.

It seems, however, that some discretion rests with the board of supervisors. *Id.*

What is not a defense to an action on the bond of a supervisor for moneys lost by failure of bankers.

Tillinghast v. Merrill, 151 N. Y. 135.

Maspeth Avenue in the county of Kings and Queens is a public highway.

People ex rel. Keene v. Bd. of Supervisors of Queens County, 151 N. Y. 190.

Upon entering office the undertaking of a supervisor must be approved by the members of the town board other than his predecessors.

Matter of Bradley, 141 N. Y. 527.

Supplementary Proceedings; See *Execution and Supplementary Proceedings*.

Surety; See *Bills and Notes; Bonds; Executor and Administrator; Guaranty; Sheriff; Subrogation; Usury*.

Liability of surety of deputy sheriff; what is misfeasance of such deputy.

Flack v. Brassel, 153 N. Y. 621.

For what period an undertaking upon adjournment in bastardy proceedings remains in force.

People ex rel. Ritzenthaler v. Higgins, 151 N. Y. 570.

The sureties for the performance of a municipal contract are not released from an obligation to save the municipality harmless from claims for damages for personal injuries arising from negligence by the omission of the municipality to exercise the right to retain the contract money until the settlement of such claims.

Mayor v. Brady, 151 N. Y. 611.

What is a defense to an action on the bond of a supervisor for moneys lost by failure of bankers.

Tillinghast v. Merrill, 151 N. Y. 135.

What will not release a surety on the bond given by contractor for faithful performance.

Smith v. Molleson, 148 N. Y. 241.

A surety will not be released by the recall by the owner of a notice to terminate the contract and a subsequent ineffectual attempt to complete.

Id.

Equity between sureties when one receives check for amount for which both are bound and fails to collect same.

Crisfield v. Murdock, 127 N. Y. 315.

Surrogates' Courts; See *Executors and Administrators; Guardians; Wills*.

I. JURISDICTION AND POWERS.

II. APPEALS.

Surrogates' Courts—*Continued.***I. JURISDICTION AND POWERS.**

The Surrogate's Court possesses such jurisdiction only as is expressly conferred by statute. *Sanders v. Soutter*, 126 N. Y. 193.

A surrogate is not disqualified from entertaining proceedings for the sale of a decedent's lands, his interest in a judgment against estate is not shown and no objection is taken on the hearing.

Matter of Bingham, 127 N. Y. 296.

Under Code Civil Procedure (§ 2538), a Surrogate's Court has power in its discretion to grant an order directing the issuing of a commission. *Matter of Plumb*, 135 N. Y. 661.

A written memorandum requiring an executrix to file an account within five days in compliance with an order previously issued, and that in case of default an attachment issue, *held*, not to be an order. *Matter of Callahan*, 139 N. Y. 51.

Consent of the attorneys for the parties cannot give jurisdiction to surrogate to make order authorizing temporary administrator to mortgage. *Duryea v. Mackey*, 151 N. Y. 204.

Where surrogate may construe will to make his decree as to distribution in proceedings to settle account.

Garlock v. Vandevort, 128 N. Y. 374.

Such jurisdiction is conferred by statute (Code Civil Procedure § 2472). *Id.*

The surrogate's jurisdiction in this respect is equal to and concurrent with the Supreme Court. *Id.*

A surrogate has no power to construe a will except so far as may be necessary to enable him to properly perform other duties imposed on him by law. *Washbon v. Cope*, 144 N. Y. 287.

The surrogate has no power to compel a legatee to restore the amount of an overpayment. *Matter of Lang*, 144 N. Y. 275.

An unrevoked order granting letters of administration is not conclusive upon next of kin who were not cited, who attain proceedings because administrator was not relative of decedent.

Matter of Patterson, 146 N. Y. 327.

The authority of the surrogate under Code Civil Procedure (§ 2624), to inquire upon probate into the validity of a testamentary gift, is limited to bequests of personal property.

Matter of Merriam, 136 N. Y. 58.

In a proceeding before the surrogate to decide upon a question of collateral inheritance tax, he has power to determine a question as to the validity of a provision in the will for the purpose of deciding whether legatees or heirs and next of kin are entitled to take. *Matter of Ullmann*, 137 N. Y. 403.

The power of a surrogate to open his decree for fraud is within that conferred upon that officer by Code Civil Procedure (§ 2481), and its exercise is not subject to the limitations of time prescribed by sections 1282 and 1290.

Matter of Flynn, 136 N. Y. 287.

Surrogates' Courts—Continued.

When the application may be made by the purchaser of the real property of a deceased surety upon the bond of the guardian whose accounts were settled by the decree sought to be opened.

Id.

A surrogate has no power on an accounting to set aside on the ground of fraud an assignment to the executor of a share in the estate.

Matter of Randall, 152 N. Y. 508.

All the parties cited in the probate of a will may take part in the proceedings thereon.

Matter of Lasak, 131 N. Y. 624.

Where no opposition is offered, the request of the petitioners should be granted.

Id.

When the jurisdiction of a surrogate attaches to decree payment of a claim.

Matter of Callahan, 152 N. Y. 320.

In the counties specified the special surrogates have powers of a county judge.

Aldinger v. Pugh, 132 N. Y. 403.

Where the execution and probate of a will only are involved, the construction of it cannot be passed upon.

Matter of Watson, 131 N. Y. 587.

Personal property must first be applied to payment of debts and funeral expenses.

Kingsland v. Murray, 133 N. Y. 170.

A Surrogate's Court has no jurisdiction to declare a trust and enforce it by decree.

Matter of Monroe, 142 N. Y. 484.

An unsworn memorandum relating to the service of the process, is not sufficient evidence thereof to justify the surrogate in assuming jurisdiction over the person of the infant.

Potter v. Ogden, 136 N. Y. 384.

Under the act of 1874 service upon an infant residing within the state could not be effectually made by publication.

Id.

The provisions of the Revised Statutes and of the Laws of 1837, relating to the publication, as amended by Laws 1863, chapter 362,—considered and construed.

Id.

When surrogate's assumption of jurisdiction is not conclusive as an adjudication.

Id.

The appointment of a special guardian for an infant respondent in a Surrogate's Court, made prior to the service of the citation upon the infant, is ineffectual.

Id.

Service of the citation upon the infant in a foreign country, without delivery of a copy to the parent or person with whom the infant resided, was insufficient under the provisions of the Revised Statutes and under Laws 1874, chapter 156.

Id.

Surrogate's Court has jurisdiction in matters relating to the conduct of executors, administrators and testamentary trustees.

Matter of Nesmith, 140 N. Y. 609.

A Surrogate's Court has no jurisdiction under Code Civil Procedure (§§ 2624, 2626), to determine in probate proceedings the quantum of the estate which benevolent societies may take as

Surrogates' Courts—Continued.

legatees under the restriction in Laws 1860, chapter 360, limiting their right to take to one-half of the estate.

Matter of Walker, 136 N. Y. 20.

The statutes have not vested Surrogates' Courts with jurisdiction to pass upon questions of title to property. *Id.*

II. APPEALS.

When only one portion of a decree is appealed from, the surrogate has power only to review such portion.

Matter of Davis, 149 N. Y. 539.

On appeal to a surrogate from the confirmation of an appraiser's report as to an estate for the purpose of a transfer tax, an appellant should be permitted to file additional allegations that since the appraisal, litigation has been commenced to determine who are the heirs and next of kin of the decedent.

Matter of Westurn, 152 N. Y. 93.

T.

Taxation; *See Corporations*; *Collateral Inheritance Act*; *Municipal Corporations*; *Tax Payer's Action*; *Transfer Tax Act*.

I. TAXING POWER.

II. TAXABLE PROPERTY.

III. ASSESSMENT AND ASSESSORS.

IV. COLLECTIONS.

V. REMEDY FOR ILLEGAL TAX.

VI. SALE, DEED, REDEMPTION AND LIEN.

I. TAXING POWER.

Where the legislature could have originally exempted property from taxation and it has been omitted from the assessment-roll, a statute ratifying and confirming the assessment as made, is valid. *Van Deventer v. Long Island City*, 139 N. Y. 133.

The comptroller has no power to set aside a tax sale on the application of the owner.

People ex rel. Millard v. Roberts, 151 N. Y. 540.

Where the comptroller of the city of New York failed to raise money to pay taxes by the issue of revenue bonds as provided for by law, the city was chargeable with interest.

People v. Myers, 138 N. Y. 590.

The provisions of the act of 1869, authorizing the application of railroad taxes to the payment of bonds issued by the town in aid of such railroad, apply to a new issue of bonds under special act. *Barnum v. Supervisors of Sullivan*, 137 N. Y. 179.

A freeholder cannot be deprived of his land under the taxing

Taxation—Continued.

power of the state, unless the procedure is substantially complied with. *Hockwood v. Gehlert*, 127 N. Y. 241.

Upon a tax sale of lands in the city of New York the certificate of the comptroller required by section 946 of the Consolidation Act is essential to vest title in the purchaser. *Id.*

Such certificate is insufficient where it does not contain a seal. *Id.*

The tax contemplated by Laws 1881, chapter 363, amending Laws 1880, chapter 542, is imposed upon the corporate franchises of a domestic corporation and upon the business of a foreign corporation, and not upon property.

People ex rel. Penn. R. R. Co. v. Wemple, 138 N. Y. 1.

It seems that property employed in interstate commerce is subject to tax the same as other property. *Id.*

A tax imposed upon a railroad corporation whose line terminates without the state, but merely has terminal facilities within it for the delivery of passengers and freight, is void. *Id.*

It seems that either a state or a foreign corporation engaged in both domestic and interstate commerce may be taxed under the statute. *Id.*

When the provisions of Laws 1874, chapter 296, appropriating the amount of county taxes collected from the New York & Oswego Midland R. R. Company in various towns or municipalities, to be applied in payment of the bonds issued by them in aid of the construction of such railroad, apply in favor of a village which was so bonded.

Village of Oneida v. Supervisors of Madison, 136 N. Y. 269.

What neglect will furnish no ground for the application of any principle of subrogation.

People ex rel. McMillan v. Supervisors of Cayuga, 136 N. Y. 81.

When a municipality, which has issued bonds pursuant to the provisions of the law, in aid of a railroad corporation, is not entitled to the fund or any portion thereof, arising from the payment of taxes by the company on an assessment upon its property within the limits of such municipality. *Id.*

The provisions of Laws 1869, chapter 907, section 4, as amended by Laws 1871, chapter 283, only authorize the purchase of bonds of the town for investment as a sinking fund, for the redemption of such bonds. *Id.*

The city of New York is not exempted from paying its quota of the state taxes for the care of the insane poor imposed by chapters 214 and 565 of 1893. *People v. Fitch*, 148 N. Y. 71.

Upon failure to pay such taxes interest arises from the date when it should have been paid. *Id.*

Where the purchasers at a judicial sale are permitted to pay certain taxes against the property out of the purchase moneys,

Taxation—Continued.

such payment extinguishes the taxes and tax titles as against a mortgagee. *Oliphant v. Burns*, 146 N. Y. 218.

The referee's report, stating the payment of part of the purchase money to the purchasers with a voucher for the payment of the tax, is *prima facie* evidence of its payment in a subsequent action. *Id.*

The provisions of Laws 1784, chapter 296, authorizing the collectors of certain towns to pay over to the town commissioner all moneys collected by him for county taxes upon the railroad in aid of which his town was bonded, only modified the provisions of the General Act of 1869, chapter 907.

Woods v. Supervisors of Madison, 136 N. Y. 403.

A foreign corporation carrying on part of its business in this state in good faith was not taxable before 1890.

People ex rel. Seth Thomas Clock Co. v. Wemple, 133 N. Y. 323.

Otherwise if its business here was merely putting together parts of machines manufactured elsewhere. *Id.*

Amount of capital employed in this state is basis for taxation. *Id.*

A foreign corporation cannot be taxed on the basis of sales made by sample within this state. *Id.*

The policy of the law must be considered in making exemptions.

People ex rel. Brush Electric Mfg. Co. v. Wemple, 129 N. Y. 543.

Property not within the exemption clause is presumed to be taxable. *Id.*

A corporation engaged in the business of furnishing electricity was exempt from taxation as a manufacturing corporation prior to 1880. *Id.*

Also corporation engaged in like business, although incorporated as a gas company.

People ex rel. Edison Electric Illuminating Co. v. Wemple, 129 N. Y. 664.

Statutes relating to assessment and collection of taxes are applicable to infants and persons under disabilities unless excepted from operation of act.

Levy v. Newman, 130 N. Y. 11.

Franchise tax may be imposed upon a manufacturing corporation of another state.

People ex rel. Southern Cotton Oil Company v. Wemple, 131 N. Y. 64.

Foreign and domestic corporations engaged in same business may be equally taxed. *Id.*

A tax imposed upon a corporation engaged in interstate commerce is invalid as interfering with the powers of congress. *Id.*

The amount of capital used in the state is the basis of taxation. *Id.*

Taxation—Continued.

Revised Statutes apply to villages only so far as they are adopted by the laws or charter regulating taxation for city purposes.

People ex rel. Young v. Willis, 133 N. Y. 383.

Provisions for taxation of debts due to non-residents are applicable only to towns. *Id.*

Debts due non-residents on contracts for sale of real property within the state, but not within the village, are taxable by the village. *Id.*

The assessment need not specify the name of the non-resident owner. *Id.*

An act providing for the exemption of certain property from taxation which takes effect immediately operates when the tax-books are open for correction.

People ex rel. American Bible Society v. Comrs. of Taxes & Assessments, 142 N. Y. 348.

The power of the legislature to exempt property from taxation is unlimited. *Id.*

II. TAXABLE PROPERTY.

Companies guaranteeing the fidelity of persons holding places of public or private trust are taxable as insurance companies under Laws 1881 (chap. 361 § 3).

People ex rel. Am. Surety Co. v. Wemple, affirmed without opinion in 126 N. Y. 623.

The provision of Laws 1886 (chap. 679, § 4,) exempting the personal property, franchise and business of insurance companies from taxation, does not include surety companies. *Id.*

When person was not entitled to exemption under 1 Revised Statutes 389 section 5, as an agent holding funds for investment, nor under 1 Revised Statutes, section 419, as an agent to whom demands were sent for collection.

People ex rel. Cochrane v. Coleman, 128 N. Y. 524.

A foreign corporation which becomes a special partner in a limited partnership in this state is taxable on the amount of its capital invested in the partnership in this state.

People ex rel. Badische Anilin & Soda Fabrik v. Roberts, 152 N. Y. 59.

A tax upon the actual value of the capital of a corporation is a tax upon the property in which such capital is invested, and if any of the property is exempt the value thereof must be deducted.

People ex rel. Edison Electric Illuminating Co. v. Barker, 139 N. Y. 55.

A foreign corporation whose business is conducted in another state is not taxable in this state, merely because it maintains an office here.

People ex rel. Harlan & Hollinsworth Co. v. Campbell, 139 N. Y. 68.

Taxation—Continued.

A foreign corporation engaged in manufacturing telephone apparatus in this state, which purchases and sells other supplies not manufactured, by it, is not exempt from taxation under chapter 542, Laws 1880, as amended in 1889.

People ex rel. Western Electric Co. v. Campbell, 145 N. Y. 587.

Stocks of foreign companies acquired by a domestic corporation in payment of sale of patent rights are not subject to tax under chapter 542 of 1880.

People ex rel. Edison Electric Light Co. v. Wemple, 148 N. Y. 690.

The combination of teas and the roasting, grinding and mixing of coffee are not manufactures under chapter 542, Laws 1880, as amended in 1889.

People ex rel. Union Pacific Tea Co. v. Roberts, 145 N. Y. 375.

Surplus earnings of a foreign corporation invested in real estate but not used in business is not taxable as "capital stock employed within this state."

People ex rel. Singer Mfg. Co. v. Wemple, 150 N. Y. 46.

Stocks of New York banks held by a foreign insurance company doing business in this state are exempt from taxation by force of section 4 of chapter 679, Laws 1886.

Ætna Ins. Co. v. Mayor, 153 N. Y. 331.

Chapter 679 of 1886, exempting bank stock held by foreign insurance companies doing business in this state from taxation, did not apply to the taxation for the year 1886. *Id.*

Where an assessment is void for want of jurisdiction of the assessors, an action may be maintained to recover the taxes paid without having the assessment set aside. *Id.*

Payment by a bank of a tax on shares of its stock held by a foreign insurance company is not such a voluntary payment as to prevent recovery of the money paid. *Id.*

The exemption from taxation, under the Corporation Tax Act of 1880, as amended in 1889, of "manufacturing corporations," etc., applies only to corporations whose business is exclusively that of manufacturing.

People ex rel. Tiffany & Co. v. Campbell, 144 N. Y. 166.

The exemption of cemetery lands continues though burials therein are prohibited.

People ex rel. Oak Hill Cemetery Assoc. v. Pratt, 129 N. Y. 68.

A joint-stock company is not taxable on its capital.

People ex rel. Winchester v. Coleman, 133 N. Y. 279.

Exemption from "local taxation" includes county as well as city purposes.

People ex rel. Pratt Institute v. Board of Assessors of Brooklyn, 141 N. Y. 476.

A home for aged men supported and maintained by charity, exempt. *Matter of Vassar*, 127 N. Y. 1.

Taxation—Continued.

A hospital which, by the terms of its charter, is exempt from taxation on all personal property, is entitled to an exemption from a legacy tax. *Id.*

The exemption provided for by the act is not confined to those bodies which enjoy complete immunity from taxation as to all property which they now have or of which they may at any time become possessed. *Id.*

Where legacies are given to corporations whose charters exempt them from taxation upon all the property they are authorized to take and hold, such legacies are not liable to the legacy tax, and it will not be assumed that they will exceed their corporate powers. *Id.*

Where all the capital stock and surplus of the corporation is invested in United States securities, the corporation is exempt and the assessors have no authority to look to the market value of the shares for the purpose of finding the basis of such assessment. *People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433.

The words "capital stock" in Laws 1857 (chap. 456, § 3), relating to the taxation of corporations, refer only to the capital of the company. *Id.*

The rules governing the assessment of such tax stated. *Id.*

What stocks and bonds of foreign and domestic corporations held by a corporation were taxable.

People ex rel. Edison Electric Light Co. v. Campbell, 138 N. Y. 543.

Where the charter of a foreign corporation provided that its business in New York was the sale of its manufactured goods, and it appeared that it merely did some incidental work in connection therewith here, it was not entitled to exemption from taxation under Laws 1880, chapter 542, as amended by Laws 1881 chapter 361; Laws 1885, chapter 359; Laws 1889, chapter 353.

People ex rel. John A. Roebling's Sons Co. v. Wemple, 138 N. Y. 582.

In determining the actual capital of a corporation for the purpose of general taxation the true value of its corporate assets, less the debts and obligations, is the rule of assessment. *Id.*

The comptroller is not bound by the value placed on the real estate by the local assessors. *Id.*

Upon *certiorari* to review the action of the comptroller in taxing a corporation, the return is conclusive in the Court of Appeals. *Id.*

The comptroller's determination as to the amount of the tax should not be disturbed unless it clearly appears to be erroneous. *Id.*

The mere fact that a corporation recently declared a dividend is not sufficient to authorize the imposition of a tax.

People ex rel. Edison General Electric Co. v. Barker, 141 N. Y. 251.

Taxation—Continued.

In taxing the capital of non-resident persons and associations invested in this state, no deduction from the sum so invested is permitted.

People ex rel. Thurber Whyland Co. v. Barker, 141 N. Y. 118.

The property of a foreign corporation invested in this state is taxable. *Id.*

III. ASSESSMENT AND ASSESSORS.

Where every essential fact appeared, entry of name of non-resident owner does not invalidate assessment.

Collins v. Long Island City, 132 N. Y. 321.

The classification of resident and non-resident owners is imperative. *Id.*

A tax against a resident may ultimately be made a lien on the land. *Id.*

Interest is payable on unpaid taxes. *Id.*

The indebtedness of a corporation should be deducted from its assets upon fixing amount of assessment.

People ex rel. Second Ave. R. R. Co. v. Barker, 141 N. Y. 196.

Were lands of a non-resident of the county are occupied by a resident of the town in which they lie, an assessment to the owner in the non-resident part of the roll is illegal.

Joslyn v. Rockwell, 128 N. Y. 334.

Laws 1889, chapter 475, section 19, limiting the tax levy of Syracuse, contained the proviso that in the levy for 1889 "there may be included in addition" is permissive.

People ex rel. Comstock v. Mayor, etc., of Syracuse, affirmed on opinion below in 128 N. Y. 632.

The entry in the record of assessment for personal taxes of the name of a lunatic with the addition of the name and address of his committee, *held*, sufficient.

People ex rel. U. S. Trust Co. v. Barker, affirmed without opinion in 137 N. Y. 631.

All the proceedings prescribed by statute for the assessment of land for taxation must be substantially if not strictly complied with. *May v. Traphagen*, 139 N. Y. 478.

It is essential to the validity of every assessment that the statute be complied with in every substantial particular.

Sanders v. Downs, 141 N. Y. 422.

Insertion of the name of a non-resident in the first column, although under the head of non-residents, and writing his address under the name so written, is a material error. *Id.*

Where it may properly be assumed by assessors that the capital stock is unimpaired.

People ex rel. Manhattan R. Co. v. Barker, 146 N. Y. 304.

In assessing real property of a corporation, the commissioners should assess it at its actual value. *Id.*

Taxation—Continued.

In assessing the personal property of a corporation, only the actual value of its capital stock is to be considered.

In making such assessment it cannot be presumed that its indebtedness represents property to that amount in addition to that represented by the capital stock. *Id.*

It will be presumed that the commissioners of taxes and assessments have performed their duty.

Where the evidence submitted to the assessors as to the value of the property of a corporation, etc., and there is some evidence to support their determination, it will not be reviewed and reversed by the court.

People ex rel. Hecker-Jone-Jewell Milling Co. v. Barker, 147 N. Y. 31.

Where the tax commissioners acted exclusively on the statement furnished by the corporation, an assessment at a greater valuation than statement shows cannot be sustained.

People ex rel. Equitable Gas Light Co v. Barker, 144 N. Y. 638.

In making an assessment of sums invested in this state by a foreign corporation, the unpaid indebtedness incurred by it in the purchase of property here is to be deducted.

People ex rel. Hecker-Jones-Jewell Milling Co. v. Barker, 147 N. Y. 31.

A non-resident special partner is not entitled, on an assessment of the sum invested by him in the firm, to a deduction of the firm indebtedness.

People ex rel. Bird v. Barker, 145 N. Y. 239.

In determining the value of the real estate of a corporation for the purpose of taxation, the assessors may legally disregard assessed value and estimate at its actual value.

People ex rel. Equitable Gas Light Co. v. Barker, 144 N. Y. 94.

Where the capital of the corporation is unimpaired, assessors are not bound to deduct its debts. *Id.*

The assessors are not bound by the statement made to them by the corporation upon an application for reduction of the assessment but may act upon other facts within their knowledge. *Id.*

An assessment against executors may be made before the will appointing them is probated.

People ex rel. Gould v. Barker, 150 N. Y. 52.

A failure of assessors to meet on the third Tuesday in August and a verification of the assessment-roll are not jurisdictional defects.

People v. Turner, 145 N. Y. 451.

Findings of comptroller against a claim that a corporation was engaged in manufacturing within the meaning of the statute is conclusive.

People ex rel. Edison Electric Light Co. v. Campbell, 148 N. Y. 759.

Taxation—Continued.

A building erected by lessee of a pier cannot be assessed for taxation against lessee, as the lessee provided it was to become the property of the city on the expiration of the lease.

People ex rel. International Nav. Co. v. Barker, 153 N. Y. 98.

An assessment of the real estate of a railroad in a town should be the cause of replacing the portion of the railroad within the jurisdiction of the assessors.

People ex rel. D. L. & W. R. R. Co. v. Clapp, 152 N. Y. 490.

The provisions of Laws 1886, chapter 659, superseded the provisions of Laws 1881, chapter 597, as to the assessment of real property of telegraph companies.

People ex rel. Western Union Tel. Co. v. Dolan, 126 N. Y. 166.

The proper method of assessment of such real property is to take the cost of the articles, and add to that cost the value of the interest in the land on which the poles stand and the value of the right to erect such poles based upon the cost which the company incurred in securing such right. *Id.*

The annual report of a railroad company to the railroad commissioners is competent evidence, in the nature of an admission, for the assessing officers to act upon.

People ex rel. Manhattan R. Co. v. Barker, 152 N. Y. 417.

An elevated railroad company should not be assessed on the cost of leases of railroads operated by it unless the value of the franchises included in such leases is deducted. *Id.*

Assessments cannot be imposed without opportunity for hearing.

Matter of Trustees of Union College, 129 N. Y. 308.

Assessment levied by state comptroller, unless erroneous, will stand.

People ex rel. Am. Contracting, etc., Co. v. Wemple, 129 N. Y. 558.

Residence within the assessment district is essential to give jurisdiction to make valid assessment of personal property.

Wilcox v. City of Rochester, 129 N. Y. 247.

In assessing a corporation for taxation the adoption of the market value of its stock for determining the value of the capital is erroneous.

People ex rel. Equitable Gas Light Co. v. Barker, affirmed without opinion in 137 N. Y. 544.

Method of ascertaining the value of the capital of a corporation considered. *Id.*

IV. COLLECTION.

Taxes against personal property of an insolvent corporation which accrued subsequent to liens acquired by attachment are not entitled to priority of payment.

Wise v. L. & C. Co., 153 N. Y. 507.

Taxation—Continued.

When corporation could not claim in proceedings to compel payment of the tax that it was a non-resident.

Matter of McLean, 138 N. Y. 158.

An equitable action will lie in behalf of a town against a county to recover the amount of state railroad taxes received by the county treasurer and used for the benefit of the county instead of purchasing and canceling outstanding bonds of the town.

Kilbourne v. Supervisors of Sullivan, 137 N. Y. 170.

Such action is in fact based upon a wrong committed by the county through its agent. *Id.*

In such case the recovery should be for the entire amount of state taxes. *Id.*

A recovery in a former action brought under the act of 1874, chapter 296, and relating only to county taxes, is not a bar to such action. *Id.*

V. REMEDY FOR ILLEGAL TAX.

The provisions of Laws 1855, (chap. 427, §§ 83, 85), do not authorize him upon the application of the owner and without notice to the purchaser, to cancel the sale for improper notice to redeem.

Ostrander v. Darling, 127 N. Y. 70.

When under Laws 1885, chapter 448, the comptroller's deed becomes conclusive evidence. *Id.*

Evidence tending to show that the notice to redeem was defective, considered. *Id.*

The rule in *People ex rel. West Shore R. R. Co. v. Adams*, 125 N. Y. 471, that a person failing to appear before the board of assessors on grievance day is guilty of *laches* which will warrant the court in refusing to grant him relief,—followed.

People ex rel. Western Union Tel. Co. v. Dolan, 126 N. Y. 166.

The rule in *People ex rel. Darrow v. Coleman*, 119 N. Y. 137, applied, avoiding an assessment of securities deposited in an adjoining state by consent of trustees.

People ex rel. Day v. Barker, 135 N. Y. 656.

When under New York Consolidation Act, section 863, an action in person may be maintained by the receiver of taxes in said city for the recovery of taxes imposed upon a non-resident stockholder of a national bank. *McLean v. Myers*, 134 N. Y. 480.

It is not a condition precedent to such action that a warrant for distress and sale be issued by such receiver, as provided in section 863, and returned unsatisfied. *Id.*

Reduction of assessment of personal property for inequality sustained. *Matter of Corwin*, 135 N. Y. 245.

Where land was purchased by the state at a tax sale and the deed recorded more than two years before the passage of the act of 1885, it was the duty of the owner to assert by affirmative

Taxation—*Continued.*

action any invalidity within time fixed by statute; otherwise his right was barred. *People v. Turner*, 145 N. Y. 451.
The County Court only has power to order the refunding of the tax after it has been paid.

Matter of Buffalo Mutual Gas-Light Co., 144 N. Y. 228.
Voluntary illegal payments by a corporation does not deprive a corporation of its remedy for the return of such payments.

People ex rel. Edison Electric Illuminating Co. v. Wemple, 141 N. Y. 471.

Under Laws 1880, section 269, taxpayer must establish that his property is assessed at a higher proportionate rate than property generally in the town to entitle him to review by *certiorari*. *People ex rel. Allen v. Badgley*, 138 N. Y. 314.

An action to recover back moneys paid upon an alleged illegal tax cannot be maintained where such illegality consists only of errors of the tax commissioners.

United States Trust Co. v. Mayor, 144 N. Y. 488.

Tax commissioner's action cannot be attacked collaterally, but the taxpayer is confined to the remedy by *certiorari* provided by chapter 269, Laws 1880. *Id.*

Section 9, article 6 of the Constitution applies to a proceeding by *certiorari* under chapter 269 of 1880 to review an assessment for taxation; what questions may be reviewed upon appeal from such decision.

People ex rel. Manhattan Ry. Co. v. Barker, 152 N. Y. 417.

Duties of commissioners of land office are of a judicial character and cannot be compelled by *mandamus*.

People ex rel. Harris v. Commissioners of the Land Office, 149 N. Y. 26.

Proper parties to writ of *certiorari* to review the decisions of the comptroller cancelling the title of the state to lands within the forest preserve, considered.

People ex rel. Forest Commission v. Campbell, 152 N. Y. 51.

There is no limitation as to the time when a corporation may apply for a revision of the tax.

People ex rel. Edison Electric Illuminating Co. v. Wemple, 133 N. Y. 617.

Taxes once paid in cannot be refunded without an appropriation. *Id.*

A petition for a writ of *certiorari* under chapter 269, Laws 1880, to review an assessment for taxation on the ground of illegality must specify the particulars of the alleged illegality.

People ex rel. Commercial Mutual Ins. Co. v. Tax Commissioners, reversed, 144 N. Y. 483.

Case where a petition raises only the question of overvaluation and not that property was exempt. *Id.*

Where a *mandamus* will not lie to compel the cancellation of a tax

Taxation—Continued.

on the ground that a correction and alteration were unauthorized.

People ex rel. Wood v. Assessors & Collector of Taxes, etc., of Brooklyn, 137 N. Y. 201.

When a proper foundation is laid for the review of the assessment by *certiorari*. *Matter of Corwin*, 135 N. Y. 245.

Where the officers or agents of a domestic corporation have been prevented by illness from making application for correction of taxes they may apply for such within six months after delivery of books to the receiver of taxes.

People ex rel. N. Y. Hotel & Restaurant Co. v. Backer, 140 N. Y. 437.

The provision of Laws 1880, chapter 269, for the review by *certiorari* of an illegal assessment does not apply where the whole assessment-roll is void.

Van Deventer v. Long Island City, 139 N. Y. 153.

The omission of property liable to assessment for taxes from the roll does not invalidate it. *Id.*

Otherwise, *it seems*, in the case of assessments for local improvements. *Id.*

A petition for a *certiorari* to review an assessment for taxation, under chapter 269, Laws 1880, on the ground of irregularity, need only state the conclusions of fact.

People ex rel. Commercial Mutual Ins. Co. v. Tax Commissioners, 144 N. Y. 483.

A petition in such a case which recites facts constitutes an overvaluation, and that the commissioners illegally and erroneously included in their valuation of the personal property certain sums specified sufficiently specifies the illegal grounds. *Id.*

The court will take judicial notice of the provisions of chapter 769, Laws 1886. *Id.*

VI. SALE, DEED, REDEMPTION AND LIEN.

Where taxes are regularly assessed against parties in possession of land, and claiming title thereto and the right of possession, and the land is sold for the non-payment of the taxes, the purchaser gets a good title as against those in possession.

Croner v. Cowdrey, 139 N. Y. 471.

Proceedings to sell lands for non-payment of taxes, under Laws 1879, chapter 229, relating to the counties of Chautauqua and Cattaraugus, *held*, effectual as against a mortgagee of the property upon the failure of the latter within two years to file with the county treasurer the notice specified in Laws 1855, chapter 427, section 82. *Chard v. Holt*, 136 N. Y. 30.

The grantee in the tax deed is in no way affected by proceed-

Taxation—Continued.

ings to foreclose the mortgage, to which he has not been made a party. *Id.*

The main purpose of the act of 1879 considered. *Id.*

When a purchaser at a tax sale is not estopped by acceptance of the sum paid by the owner to redeem the premises, from setting up the title acquired under a previous tax sale. *Id.*

Similarity of the provision of Laws 1885, chapter 448, that the comptroller's deeds upon sales of non-resident lands for non-payment of taxes should be conclusive evidence that the sale of such lands and all proceedings prior thereto, and chapter 427 of 1855, as to jurisdictional defects.

Joslyn v. Rockwell, 128 N. Y. 334.

The provisions of Laws 1885, chapter 427; Laws 1885, chapter 448; Laws 1891, chapter 217, do not authorize the comptroller to entertain and act upon the application of an owner of land sold for taxes for a cancellation of the tax sale, but the amendment of Laws 1891, chapter 217, section 2, applies only to persons interested in the refunding of moneys.

People ex rel. Hamilton Park Co. v. Wemple, 139 N. Y. 240.

An application to the comptroller under chapter 711, Laws 1893, for the redemption of lands from an invalid tax sale, after a conveyance thereunder has been executed, can only be made by the purchaser.

People ex rel. Witte v. Roberts, 144 N. Y. 234.

What does constitute such occupancy of the land as to required notice.

People ex rel. Chase v. Wemple, 144 N. Y. 478.

The comptroller has no power to review, annul or vacate an order made by him allowing a redemption. *Id.*

Under Laws 1850, chapter 86, article 6, section 48, as to tax sales in Albany a purchaser under an invalid tax sale was entitled to demand reimbursement immediately thereafter, and that under Code Civil Procedure (§ 240), cause of action was barred in six years after time of demand.

Reid v. Supervisors of Albany, 128 N. Y. 364.

Effect of *Ramsen v. Wheeler*, 105 N. Y. 573, on tax sale and recovery of money paid at sale in Albany discussed. *Id.*

Where too lots which had formerly been a part of one parcel of land were included in one valuation, assessment, and tax, instead of being assessed separately, *held* tax sale thereof void.

May v. Traphagen, 139 N. Y. 478.

What is insufficient to establish an occupancy requiring service of a notice to redeem.

People v. Turner, 145 N. Y. 451.

A comptroller's certificate that notice of redemption had been served which is not under seal is fatally defective.

Clason v. Baldwin, 152 N. Y. 204.

Taxation—Continued.

A notice of redemption which describes property on the wrong side of the street is substantially defective. *Id.*

A notice which names four different days for the redemption of various lots, without specifying the last day for redemption of any particular parcel is defective. *Id.*

The occasional occupancy of a log house to hunt game is not actual occupancy.

People ex rel. March v. Campbell, 143 N. Y. 335.

Where the application to redeem was made by the relator as "agent" without stating his interest, he has no legal standing. *Id.*

Lands belonging to an infant having no guardian may be sold.

Levy v. Newman, 130 N. Y. 11.

Failure to redeem after notice destroys title. *Id.*

What notice is necessary under the provision of the Brooklyn Arrearage Act, Laws 1883, chapter 114, requiring notice of sale to be given to all persons having an estate in the lands sold.

Martin v. Stoddard 127 N. Y. 61.

Taxpayer's Action ; See Injunction ; Taxation.

A taxpayer's action is not a proper remedy to compel the mayor of a city to make a classification of positions in civil service.

Chittenden v. Wurster, 152 N. Y. 345.

The illegal official act to prevent which a taxpayer's action will lie is such only as will produce a public injury.

Rogers v. O'Brien, 153 N. Y. 357.

Such an action will not lie in behalf of one wrongfully in possession of city property to prevent its reclamation by one of the city departments. *Id.*

What is no defense to a proceeding by a taxpayer of a bonded town, to compel the county treasurer to invest in a sinking fund taxes collected from a railroad.

Clark v. Sheldon, 134 N. Y. 333.

The act of the county treasurer in refusing to execute the law in a particular case, *held*, willful so as to render him chargeable with interest on the fund and costs of the proceeding. *Id.*

Telegraphs and Telegraph Companies ; See Corporations.

A telephone company is within the provisions of the statute providing for the construction of telegraph lines.

Eels v. American Telegraph & Telephone Co., 143 N. Y. 133.

The permission by the legislature to erect telegraph and telephone lines does not dispense with the obtaining of the consent of the abutting owner in fee. *Id.*

It seems that the transmission of messages by telephone through the medium of an electric current passing over extended wires

Telegraphs and Telegraph Companies—Continued.

is authorized by a statute for the incorporation of telegraph companies.

Hudson River Telephone Co. v. Waterboliet Turnpike & Ry. Co., 135 N. Y. 393.

Tenant for Life.

Where the beneficiary who has a life interest becomes a non-resident and the entire fund is in cash, upon settlement of the account the same should be paid to the administrator who should only be compelled to pay it to the widow upon receiving a bond.

Matter of McDougall, 141 N. Y. 21.

A remainderman cannot claim the payment to him of the fund in which another has a life estate, upon his giving security to the tenant for life that he will be paid the interest.

Matter of Camp, 126 N. Y. 377.

A tenant for life, originally, also guardian of the remainderman, cannot be compelled by latter when he reaches majority to give immediate possession of the fund.

Id.

The conveyance, by a tenant for life, of the fee only passes to the grantee all the interest which the grantor could convey.

Thompson v. Simpson, 128 N. Y. 270.

Tenants in Common ; See Husband and Wife ; Joint Tenants ; Partition.

When a tenant in common cannot be allowed in partition for improvements made by him.

Cosgriff v. Foss, 152 N. Y. 104.

A tenant in common cannot so use lands held by him in severalty as to acquire an easement therein.

Palmer v. Palmer, 150 N. Y. 139.

Right of a tenant in common of oyster beds to remove oysters.

Mott v. Underwood, 148 N. Y. 463.

Right of a tenant in common to recover purchase price given his tenant in common for property owned jointly by them.

Knope v. Nunn, 151 N. Y. 506.

Purchase of mortgage by one does not defeat the rights of the remaining co-tenants.

Carpenter v. Carpenter, 131 N. Y. 101.

Where titles were acquired under foreclosure and deeds in severalty subsequently made, a trust results in favor of the co-tenants.

Id.

Tender ; See Contracts ; Payments ; Vendor and Purchaser.

Where a vendee has repudiated the contract, no tender by the vendor is necessary.

Stokes v. Mackay, 147 N. Y. 223.

Inability to deliver stock sold will not be inferred because it was pledged for a loan unless person is shown to be unable to redeem.

Id.

Tender—*Continued.*

Where by the terms of a mortgage, the mortgagee covenants to release a portion of the mortgaged premises upon payment of a specified portion of the sum secured, a tender of the amount specified is not available in an action to foreclose the mortgage, as a basis for affirmative relief unless it has been kept good, and the money paid into court. *Werner v. Tuch*, 127 N. Y. 217.

In actions for equitable relief what tender is necessary.

Zebley v. Farmers' Loan & Trust Co., 139 N. Y. 461.

While a tender destroys a lien of the mortgage, it does not destroy the debt. *Nelson v. Loder*, 132 N. Y. 288.

In order to destroy liability for subsequently accruing interest the tender must be kept good. *Id.*

A subsequent lienor's right to redeem is like that of the owner. *Id.*

Offer made in the complaint and production at trial are sufficient tender. *Berry v. Am. Central Ins. Co.*, 132 N. Y. 49.

In an equity action it is sufficient to offer to restore. *Id.*

Tenement Houses ; *See Municipal Corporations.*

Section 663 of the Consolidation Act, as amended by chapter 84, Laws 1887, requiring tenement houses to be furnished by the owners with water on each floor when the board of health so directs, is a valid exercise of the police power.

Health Department v. Rector, etc., of Trinity Church, 145 N. Y. 32.

Such section authorizes the board to require the owner to furnish appliances for the distribution of the water, and includes a sufficient supply of water for domestic use. *Id.*

One place of supply on each floor, if fairly accessible, is sufficient. *Id.*

Title to Land ; *See Adverse Possession ; Commissioners of Land Office ; Vendor and Purchaser.***Towns.**

A bridge located in a village, though excepted by charter from the jurisdiction of the village, is a town bridge.

People ex rel. Root v. Board of Supervisors, 146 N. Y. 107.

Under § 130 of the Highway Law, a county must contribute to the expenses of a free public bridge under fixed conditions expressed in statute. *Id.*

Chapter 344 of 1893, extending term of office of town clerk to two years, did not apply to one elected the day before such act was approved.

People ex rel. LeRoy v. Foley, 148 N. Y. 677.

The day when the ballots were cast is the day of election of a public officer. *Id.*

Towns—Continued.

A town is not bound by the representations of one of its trustees as to his authority to execute a conveyance of the town property, and such conveyance executed without authority is voidable.

Trustees, etc., of Easthampton v. Bowman, 136 N. Y. 521.

What will not amount to a ratification of an unauthorized conveyance by town trustees. *Id.*

Before a municipal corporation can be held to have ratified the unauthorized act of its officers or assumed agents, the rule should be strictly enforced that the facts constituting the ratification should be fully and clearly proved. *Id.*

A supervisor of a town is not bound to accept the instructions of town meeting as to settlement of suit.

Hurlbert v. Defendorf, appeal dismissed, 128 N. Y. 652.

When a vacancy exists in an office where the person who held the office formerly held under the public officers' law.

People ex rel. Lovett v. Randall, 151 N. Y. 497.

A statute enlarging the term of a town officer applies only to officers elected after it went into effect. *Id.*

When statute, extending term of sole commissioner of highways, becomes operative. *Id.*

A town is liable only in cases where the commissioner of highways formerly was liable.

Lane v. Town of Hancock, 142 N. Y. 510.

The commissioner is held to the use of ordinary care. *Id.*

The attention required in a sparsely settled district is less than that exacted for a great thoroughfare.

Glasier v. Town of Hebron, 131 N. Y. 447.

The town is liable where the highway commissioner would have been before 1881.

Clapper v. Town of Waterford, 131 N. Y. 382.

Lack of funds necessary to make repairs and of power to raise them is a defense. *Id.*

A commissioner is not guilty of negligence when he has no funds in his hands. *Id.*

Town is not liable where supervisor fails to pay over funds to commissioner. *Id.*

Not necessarily negligence to fail to discover defect in a plank walk leading to a roadway. *Id.*

Extraordinary power is not granted to a special town meeting.

Birge v. Berlin Iron Bridge Co., 133 N. Y. 477.

Statutes limiting the power of a special town meeting do not affect the general power of towns. *Id.*

Trade-Mark.

When an individual name used as part of a corporate name may be restrained. *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462.

Trade-Mark—Continued.

The use of wrappers and a certain form of package will not be restrained because of the infringement of trade-mark.

Brown v. Doscher, 147 N. Y. 647.

Parties using, "Harlem & Westchester Clothing Co." cannot enjoin others using "New York & Westchester Clothing Co."

Wormser v. Levy, affirmed without opinion, 126 N. Y. 670.

The test in determining the right of a seller, who claims a right to the exclusive use of a trade-mark, is whether the resemblance of that claimed to infringe is such as is calculated to and does deceive.

Fischer v. Blank, 138 N. Y. 244.

Circumstances under which, *held*, that plaintiffs were not entitled to the exclusive use of the form of packages, the labels or words when used separately, but that the combination of them by another dealer in a way calculated to deceive was properly restrained.

Id.

A direction in the judgment for the destruction of defendant's labels was erroneous.

Id.

What is necessary in order to support an action for the infringement of a trade-mark.

Vulcan v. Myers, 139 N. Y. 364.

Injunction, *held*, to have been properly granted in the case of an imitation of labels on match-boxes identical in shape, size and color, except that defendant's label contained the word "Vulture" instead of "Vulcan."

Id.

An injunction will be refused to protect infringement of a trade-mark where the owner has by his own conduct misused the trade-mark.

Prince Manfg. Co. v. Prince's Metallic Paint Co., 135 N. Y. 24.

So *held*, where the owner of a trade-mark for "Prince's Metallic Paint," which had been used for many years to describe paint manufactured from the ore of a particular mine, had improperly used it to designate paint manufactured from ore from other mines.

Id.

The purchase of mills and mines where a certain paint had been manufactured at a sale in foreclosure, *held* not to carry the right to the trade-mark under which the paint was sold.

Id.

A trade-mark cannot be levied upon and sold under execution, except under authority of a statute.

Id.

Attempted assignments by directors of the corporation owning the trade-mark, *held*, invalid.

Id.

Where a name is a new, arbitrary and fanciful one it will be protected as a trade-mark.

Keasbey v. Brooklyn Chemical Works, 142 N. Y. 467.

Where a name is arbitrary or fanciful it is entitled to protection as a trade-mark.

Waterman v. Shipman, 130 N. Y. 301.

Where use of the name by another manufacturer is illegal.

Id.

Where the name indicates that it is both manufactured and patented, its exclusive use will be protected.

Id.

Transfer Tax ; *See Collateral Inheritance Act.*

An estate in remainder created by the will of the testator who died while the act of 1885 was in force must be appraised as of the time of testator's death. *Matter of Davis*, 149 N. Y. 539.

Where a person entitled to the remainder could not be known until the death of the life-tenant, the tax does not accrue until such death. *Id.*

On appeal to the surrogate from a portion of a decree made by him under the Transfer Tax Act, he only has power to review such portion appealed from. *Id.*

Money of a non-resident decedent deposited in a bank in this state is subject to transfer tax.

Matter of Houdayer, 150 N. Y. 37.

Bonds of a foreign corporation owned by non-resident decedent, but kept in a safe deposit vault in this state, are subject to transfer tax.

Matter of Morgan, 150 N. Y. 35.

Bonds of a foreign corporation, and also bonds and certificates of stock of a domestic corporation, owned by a non-resident decedent but deposited in a safe deposit vault in this state, are subject to transfer tax.

Matter of Whiting, 150 N. Y. 27.

United States bonds are not taxable.

Id.

Bonds of a domestic corporation, owned by a non-resident decedent, held by him at his domicile at the time of his death, are not subject to transfer tax.

Matter of Bronson, 150 N. Y. 1.

Certificates of stock of domestic corporation held by non-resident decedent at his domicile are taxable.

Id.

When, in a deed of trust, remainders take effect after donor's death, they are taxable.

Matter of Green, 153 N. Y. 223.

When the beneficiaries of a trust take possession after donor's death, it is immaterial on the question of taxation whether they reside at that time in the state.

Id.

Property willed to nephew's children was not taxable under the act of 1892.

Matter of Seaman, 147 N. Y. 69.

The provision of subdivision 3 of section 1 of the Transfer Tax Act of 1892, refers only to grants or gifts *causa mortis*.

Id.

The exemption in section 2 of chapter 399, Laws 1892, of property devised or bequeathed to any religious corporation does not apply to foreign corporations.

Matter of Balleis, 144 N. Y. 132.

The will of a wife dying in 1883 gave estate to husband for life with power to dispose of the same during his life and by will; the husband died in 1894 and directed the executor to distribute the property according to the provisions of his wife's will, *held*, that the remaindermen under the will of the wife should not be taxed on their legacy.

Matter of Langdon, 153 N. Y. 6.

United States bonds are exempt from valuation for the purpose of fixing the tax under the Transfer Tax Act.

Matter of Sherman, 153 N. Y. 1.

Transfer Tax—Continued.

Expenses incurred by successful contestants of a will cannot be deducted in valuing the estate.

Matter of Westurn, 152 N. Y. 93.

A note upon which litigation is pending should be excluded from the valuation and reserved for future appraisal should the executors succeed in collecting it. *Id.*

On appeal to a surrogate from the confirmation of an appraiser's report as to an estate for the purpose of a transfer tax, an appellant should be permitted to file additional allegations that, since the appraisal, litigation has been commenced to determine who are the heirs and next of kin of the decedent. *Id.*

The power of the surrogate to appoint an appraiser does not depend on the prior ascertainment of the existence and amount of claims against the estate. *Id.*

In valuing an estate for the purpose of the Transfer Tax Act it is proper to deduct a sum for commissions of the executor or administrator. *Id.*

The transfer tax extends to stocks of foreign corporations.

Matter of Merriam, 141 N. Y. 479.

A legacy to the United States is subject to the transfer tax. *Id.*
Insurance policies upon the life of decedent payable to his legal representatives are subject to the transfer tax.

Matter of Knoedler, 140 N. Y. 377.

The limitation upon the amount of personal property to be taxed applies to the aggregate of all the property transferred.

Matter of Hoffman, 143 N. Y. 327.

Where the interest is contingent, the tax could not be decided. *Id.*

Where the succession tax was not paid within the statutory period because the estate could not then be settled, interest at rate of six per cent. may be charged after expiration of statutory period.

Matter of Fayerweather, 143 N. Y. 114.

If there is any doubt as to the imposing of tax or interest it should be resolved in favor of the person taxed. *Id.*

Trespass.

A finding of fact is conclusive on the Court of Appeals if there is no evidence to support it. *La Rue v. Smith*, 153 N. Y. 428.

The court has power to confine plaintiff's right of action to specific wrongs alleged in the complaint. *Id.*

What declaration of one of two trespassers are competent on the question of treble damages. *Humes v. Proctor*, 151 N. Y. 520.

In an action for trespass, the question of limits of the property upon which the trespass was committed is one for the jury. *Id.*

Improvement and occupation of part of premises will sustain an action against an intender. *Donohue v. Whitney*, 133 N. Y. 178.

Trespass—Continued.

Right of action for trespasses upon real property affected by an unlawful structure, and nature of trespass is continuous.

Galway v. Metropolitan Elevated Ry. Co., 128 N. Y. 132.

So long as the legal right to redress exists, a remedy may be sought in equity. *Id.*

The construction and maintenance of a structure in the public street in front of the premises of an abutting owner without his authority is a trespass, liability therefore discussed.

Pappenheim v. Metropolitan Elevated Ry. Co., 128 N. Y. 436.

In action at law the owner of property trespassed upon cannot recover damages based on theory that such trespass is to be permanent. *Id.*

The judgment entered for the damages sustained does not give right to continue the trespass. *Id.*

The owner may resort to equity for the purpose of enjoining the continuance of the trespass. Court may determine the amount of damages which the owner would sustain if the trespass were permanently continued. *Id.*

When a railroad company is actually running its cars upon or through plaintiff's property, whether it would not be justified in refusing to pay and submitting to an injunction,—*quære*. *Id.*

Owner may insist on stopping trespass where party has no equal right to acquire the property. *Id.*

Where an independent contractor is hired to shove up an adjoining building according to law, such hiring does not authorize him to enter the adjoining premises without permission.

Ketcham v. Newman, 141 N. Y. 205.

For what time a purchaser of the absolute fee of the property affected may maintain an action for the trespass.

Pappenheim v. Metropolitan Elevated Ry. Co., 128 N. Y. 436.

Measure of damages would be difference between the fair market value of the whole property at the time of condemnation without the structure, and the present market value. *Id.*

The right of a vendee to restrain future trespasses cannot be defeated because of the fact that he purchased at a reduced price; right to restrain further trespasses to vendee. *Id.*

When punitive damages ought not to be awarded. *Id.*

Trial; *See Practice.*

Trover; *See Conversion.*

Troy; *See Municipal Corporations.*

Trustees; *See Trusts.*

I. APPOINTMENT AND REMOVAL.

II. POWERS AND DUTIES.

Trustees—Continued.

III. LIABILITIES.

IV. COMPENSATION.

I. APPOINTMENT AND REMOVAL.

The affirmance by the Court of Appeals of an order made on application of a depositor in a savings bank for leave to intervene in proceedings for the sequestration of its property, and to have a sale set aside on the ground that an order allowing them to purchase was illegal, adjudging that such sale was valid, settles the validity of the title of such trustees.

Webster v. Kings County Trust Co., 145 N. Y. 275.

When a will directs the property to be kept together as long as possible, and the codicil creates a trust for the benefit of the children of the son during life of latter, and makes him trustee, the son is trustee of net income of share and not of the share itself.

Corse v. Chapman, 153 N. Y. 466.

An appointment of a beneficiary as trustee on the death of resignation of the testamentary trustee does not extinguish the trust.

Losey v. Stanley, 147 N. Y. 560.

Beneficiaries who succeed trustees as trustees take good title to the property in trust.

Lahey v. Kortright, 132 N. Y. 450.

Where a power of sale is annexed to a trust it will be taken by subsequent trustees.

Id.

Removal of a testamentary trustee sustained on the ground that the facts justified an inference that he had misapplied estate.

Matter of McGillivray, 138 N. Y. 308.

When the purpose of a trust has been accomplished, the estate of the trustee is at an end.

Blood v. Kane, 130 N. Y. 514.

II. POWERS AND DUTIES.

The title of trustee, personally purchasing trust property on foreclosure of a mortgage given by creator of the trust is voidable.

Kahn v. Chapin, 152 N. Y. 305.

Executors and testamentary trustees who are authorized to receive the rents have power to lease property.

Corse v. Corse, 144 N. Y. 569.

One who is appointed a trustee for certain purposes of one of the shares is not a necessary party to a lease executed prior to the division.

Id.

The court has no power, under section 65 in the Statute of Uses and Trusts, to authorize trustee to mortgage infant remainderman's property.

Losey v. Stanley, 147 N. Y. 560.

Such mortgage may be collaterally assailed.

Id.

The Supreme Court has no jurisdiction to compel a trustee to consent to a destruction of the trust.

Cuthbert v. Charvet, 136 N. Y. 326.

The court has no power, in an action for partition between heirs

Trustees—*Continued.*

and devisees, to direct the trustee to enter into a stipulation providing that a judgment shall be entered declaring the will void. *Id.*

It seems that it would be a breach of duty on the part of the trustee to allow judgment to be taken adjudging the trust provision of the will void. *Id.*

The expediency or in expediency of an act by trustees is a matter of discretion. *Tilden v. Green*, 130 N. Y. 29.

Where the trustee prosecuted in his own name and was liable personally, he may have a right to reimbursement.

Woodruff v. New York, Lake Erie, etc., R. R. Co., 129 N. Y. 27.

A trust company organized under Laws 1887, chapter 46, which permitted it to receive deposits of trust moneys, *held*, not to violate Laws 1882, chapter 409, section 283, prohibiting advertising or receiving deposits as a savings bank.

People v. Binghampton Trust Co., 139 N. Y. 185.

A provision in a will that the trustee pay the residue of income after taxes and expenses to the *cestui que trust*, authorizes an order of the surrogate to pay over every six months.

Matter of Smith, affirmed without opinion, 126 N. Y. 641.

Where the use of the real estate was given by will to the widow, no title vested in the trustee to enable him to sell or mortgage in the absence of express provisions in the will.

Matter of Clarke, affirmed on opinion below, 128 N. Y. 658.

The effect of the decree of the surrogate settling accounts of executor does not affect such executor's action in keeping the whole estate together.

Monson v. Security and Trust Co., 140 N. Y. 498.

The mere receipt by the beneficiaries of legal interest upon their shares is not an acquiescence in the assumption that that was all they were entitled to. *Id.*

A trustee is properly credited with disbursements for office rent and expenses which the surrogate finds were necessary to carry on the business. *Matter of Nesmith*, 140 N. Y. 609.

Where the trustee expended a sum which resulted in a betterment of the property, he is entitled to reimbursement out of the increased earnings. *Id.*

III. LIABILITIES AND DISABILITIES.

Where executors on their final accounting, with the approval of the surrogate, divide the trust fund, one trustee cannot be held liable for misconduct of the other thereafter.

Cline v. Sherman, 144 N. Y. 601.

The liability of a mortgage trustee upon uncollected checks which were taken upon a sale of foreclosure is terminated by a disaffirmance by the bondholders.

Harrison v. Union Trust Co., 144 N. Y. 326.

Trustees—Continued.

When an action for an accounting cannot be maintained against the trustee under a mortgage. *Id.*

An action cannot be maintained to compel the trustee to convey to the purchaser on the foreclosure sale, where the decree directed such conveyance. *Id.*

An amendment of a judgment of foreclosure, in an action in which the mortgage trustee was made a party but did not answer, by directing such trustee to convey to the purchaser at the sale, is at most voidable. *Id.*

Co-trustees, under a trust for the benefit of depositors in an insolvent bank, one of whom is also receiver of the bank, are not guilty of negligence in transferring to receiver the funds jointly held by them for immediate distribution among the depositors; liable for a misappropriation by him,—considered.

Purdy v. Lynch, 145 N. Y. 462.

Co-trustees are not liable for the misappropriation of funds received directly by receiver or paid to him by agent of trustees. *Id.*

Where a substituted trustee sued to foreclose a mortgage executed to predecessor by defendant and the latter counterclaimed for services rendered to the former trustee under a contract which bound him personally, *held*, that counterclaim was properly not allowed under Code Civil Procedure, (§ 502, subd. 3).

United States Trust Co. v. Stanton, 139 N. Y. 531.

When tenants under a lease providing for were entitled to the renewals, and the trustee under a beneficiary's will could be compelled to execute a new lease.

Gomez v. Gomez, 147 N. Y. 195.

Where their proceedings have been the result of an honest construction of their powers, trustees are not liable.

White v. Wood, 129 N. Y. 527.

Trustees should not be enjoined from issuing extra stock to cover expenses to be incurred. *Id.*

Where the evidence is insufficient to prove bad faith on their part, the trustees are not liable. *Id.*

Where the trustee in good faith mingles the trust money with his own in carrying on the testator's business, it is not proper to charge him with legal interest on all the trust moneys deposited in such account.

Matter of Nesmith, 140 N. Y. 609.

Though land was conveyed upon an oral trust, since it was lawful for defendant to perform and he did perform it, he is liable as trustee of personality. *Bork v. Martin*, 132 N. Y. 280.

Having received the proceeds of sale, defendant could not dispute his agency nor his principal's power to appoint. *Id.*

The court will not allow the Statute of Frauds to be an instrument of fraud. *Id.*

Trustees—Continued.

A trustee cannot properly be made liable for interest not earned.
Matter of Barnes, 140 N. Y. 468.

A trustee may be held liable where the failure to earn interest occurred through his fault or negligence. *Id.*

IV. COMPENSATION.

Trustees have the right to appoint an agent to perform part of their work, and may appoint one of their number.

Purdy v. Lynch, 145 N. Y. 462.

For his personal services the trustee should only be allowed a sum equal to executor's commissions.

Woodruff v. N. Y. & Lake Erie R. R. Co., 129 N. Y. 27.

Trustees are entitled to commissions for receiving all moneys which constitute the corpus of the estate.

Beard v. Beard, 140 N. Y. 260.

Where the trustee settles with the beneficiary before the accounting he may deduct his commissions. *Id.*

Trusts ; See Perpetuities ; Trustees.**I. CREATION.****II. PERPETUITIES AND TRUSTS FOR ACCUMULATIONS.****III. STATUTE OF USES AND TRUSTS.****IV. CHARITABLE TRUSTS.****V. RESULTING TRUSTS.****VI. CONSTRUCTIVE TRUSTS.****VII. TRUST ESTATE.****I. CREATION.**

A trust of money may be established by parol.

Bork v. Martin, 132 N. Y. 280.

An attempted trust held unenforceable for failure to designate a beneficiary.

People v. Powers, 147 N. Y. 104.

When a trust is created by a parol promise.

Trustees of Amherst College v. Ritch, 151 N. Y. 282.

Where a mortgage is given for the balance of purchase money, and the title is in the purchaser, the party advancing the purchase money paid cannot take legal title.

Bates v. Ledgerwood Mfg. Co., 130 N. Y. 200.

A purchase made under provisions of statute is protected by such statute.

Matter of Field, 131 N. Y. 184.

The assent of parties to a sale is sufficiently shown by their appearance by attorney and their subsequent conduct. *Id.*

A trust in personal property may be created by parol.

Hirsh v. Auer, 146 N. Y. 13.

A parol agreement by the beneficiary of an insurance policy with

Trusts—Continued.

- the insured to expend a certain portion and divide the balance creates a trust. *Id.*
- The subject of the trust may be a contingent interest, and attaches when it becomes vested. *Id.*
- Case not considered where no trust was created as to residue following provisions as to trust, but the residue vested in the legatees. *Matter of Murphy*, 144 N. Y. 557.
- What transfer of bank account does not create a trust. *Cunningham v. Davenport*, 147 N. Y. 43.
- Moneys remitted by a principal to his agent for the purpose of putting him in funds to meet obligations and liabilities incurred by him in the business are impressed with a trust in favor of the principal. *Roca v. Byrne*, 145 N. Y. 182.
- An agreement by a purchaser to hold the property at the disposal of another creates no trust. *Falvey v. Bridges*, 133 N. Y. 663.
- A certain designated beneficiary is essential to the creation of a valid trust. *Tilden v. Green*, 130 N. Y. 29.
- Absence of such beneficiary is not obviated by the existence of a power to select trustees. *Id.*
- Doctrine of *cy pres* has no place in the jurisprudence of this state. *Id.*
- Where several trusts are created, some lawful and some unlawful, and the rejection of the latter will defeat the testator's intention, all the trusts must be construed together and held illegal. *Id.*
- Provision of will that lot and amount be set apart for widow and at her death be sold and divided between the children, construed that no trust was created. *Matter of Collins*, 144 N. Y. 522.
- A court of equity has power, upon rescission of fraudulent sale, in absence of legal remedies, to reach proceeds in the hands of the fraudulent vendee or his voluntary assignee. *American Sugar Refining Co. v. Fancher*, 145 N. Y. 552.
- An appointment of the beneficiary as trustee on the death or resignation of the testamentary trustee does not extinguish the trust. *Losey v. Stanley*, 147 N. Y. 560.
- An expression by the testator that it was his "desire and request" that his wife provide for and educate a child, does not qualify an absolute gift to his wife. *Clay v. Wood*, 153 N. Y. 134.
- The mere fact that at the time of the execution of a trust deed one of the trustees had the property in his hands and occupied a fiduciary relation with the grantor, is not sufficient to invalidate the deed. *Townsend v. Allen*, affirmed without opinion, 126 N. Y. 646.
- The reservation by the settler of a trust of a power of revocation is consistent with the trust and does not work its destruction where the rights of creditors are not involved. *Von Hesse v. MacKaye*, 136 N. Y. 114.
- The deposit of securities for the benefit of the adopted daughter

Trusts—Continued.

of the testator, for the express purpose of providing for her, *held*, to create a trust. *Id.*

A trust in lands may be established by letters or informal memoranda signed by the parties if they contain enough to show the nature and character of the trust intended.

Hutchins v. Van Vechten, 140 N. Y. 115.

The trust may be manifested by writing, whether it originated by parol agreement or otherwise. *Id.*

The trust must be established wholly by writing, sufficient within the statutes, and must be interpreted like all other contracts and written instruments. *Id.*

Trusts of personal property may be created without writing.

Matter of Carpenter, 131 N. Y. 86.

Where one of several trusts created in an instrument is legal, and the remainder invalid, the former will be upheld if possible.

Culross v. Gibbons, 130 N. Y. 447.

The Supreme Court has inherent power to execute a trust, and in the absence of a trustee it may and will take upon itself its execution.

Kirk v. Kirk, 137 N. Y. 510

When a trustee is appointed of a fund in the hands of a receiver, he is the successor of the court in the administration of the trust and bound by the judgments. *Id.*

A trust for the benefit of children is not invalidated by the fact that the widow was given a life-estate.

Corse v. Chapman, 153 N. Y. 466.

A will directed a division of residuary estate into eight parts, the income of each part to be paid to testator's children during life and upon death to the lawful issue of such child, *held*, that eight separate and legal trusts were created and that there was no unlawful suspension of power of alienation. *Id.*

An instrument transferring bonds to trustees upon a special trust is effectual without a seal.

Barnard v. Gantz, 140 N. Y. 249.

Where the beneficiary is not designated and certain, no trust results.

Warnwright v. Low, 132 N. Y. 313.

Where a valid trust terminates with the death of the grantor, the real estate descends to the heirs. *Id.*

A declaration, executed by a grantee and devisee of a farm to the effect that he considered himself bound to appropriate the rents and profits to the support of the grantor's son, a lunatic, created a valid and enforceable trust which was irrevocable.

McArthur v. Gordon, 126 N. Y. 597.

Upon a disregard of such obligation by the trustee and his grantee who assumed their performance, they were liable for such damages as had been incurred on account of their default. *Id.*

Trusts—Continued.

A trust of personal property may be effectually framed in which the author of the trust is the trustee.

Locke v. Farmers' Loan & Trust Company, 140 N. Y. 135.

A reservation in a declaration of a power of revocation must be consistent with the purposes of the trust. *Id.*

II. PERPETUITIES AND TRUSTS FOR ACCUMULATIONS.

A testamentary trust to receive the rents, etc., and to apply the same to the use of eight persons, one share for each, vests the trustees at once with the whole estate in the form of eight undivided shares.

Knox v. Metropolitan Elevated R. Co., affirmed without opinion in 128 N. Y. 625.

The rule, reiterated, that a trust for distribution and payment to each beneficiary or class of beneficiaries upon events specified, is not an unlawful suspension of the absolute power of alienation. *Id.*

A trust to pay annuities may be lawfully constituted.

Cochrane v. Schell, 140 N. Y. 516.

Such an annuity is not assignable. *Id.*

Where the trust is duly limited in point of duration the title to the whole estate vests in the trustee during the trust term. *Id.*

Where the power of alienation is suspended by a valid limitation of a contingent expectant estate, the rents and profits go to the persons entitled to the next eventual estate. *Id.*

The estate for the preservation or improvement of which the real property of a decedent held in trust may be sold or mortgaged under Laws 1886, chapter 257, amending the provisions of the Revised Statutes, is the particular real estate held by the trustee. *Matter of Clarke*, affirmed on opinion, 128 N. Y. 658.

Where an application was made to mortgage in order to raise money to pay an annuity, and pay taxes, the order granting it should be reversed on appeal. *Id.*

Trust to testamentary trustees of a fund to pay the income to testator's daughter during her lifetime, and then at her death to pay the principal and remaining income to her children until majority, share and share alike, construed.

Matter of Straut, 126 N. Y. 201.

A holographic will construed that a widow took an equitable life estate in one-fourth of an estate and that the trust terminated on her death and her share vested absolutely in the children named.

Hopkins v. Kent, 145 N. Y. 363.

Provisions of will that income be invested for minor, construed that the entire interest vests in such minor as soon as paid in, and upon his death during minority the accumulations become part of his estate.

Smith v. Parsons, 146 N. Y. 116.

Trusts—Continued.

Where a will provides that accumulation of income be paid to infant on coming of age, and the entire interest thereafter applied to his use during life and upon his death is to be transferred to his children, the entire interest vests in such minor as soon as paid in. *Id.*

Where the trustees failed to establish the separate trusts ordered in a will, the *cestui que trusts* are entitled to share proportionately in the increased earnings of the estate.

Monson v. Security and Trust Co., 140 N. Y. 498.

The fact that the trustee simply paid the beneficiaries legal interest upon the original face value of their shares will not defeat their right to share in the increase. *Id.*

A trust held not void as unduly suspending the power of alienation. *Montignani v. Blade*, 145 N. Y. 111.

A devise to a daughter to be held in trust by the executors for seven years and then given to her, or, if she were dead, to be disposed as directed, is not void. *Id.*

Trust held to be measured by two lives in being and valid. *Id.*

A trust to pay income to the beneficiary until he is 35 years old and then to pay over the principal to him, construed.

Sawyer v. Cubby, 146 N. Y. 192.

A suspension of the power of alienation of real estate or of absolute ownership of personalty occurs when there are no persons in being by whom an absolute estate in possession can be conveyed. *Id.*

A trust to pay income to the beneficiary until he is 35 years old and to pay over the principal to him at that time is not unlawful. *Id.*

A direction to divide among certain churches according to the number of members "to buy coal for the poor of said churches," does not create a trust but a valid bequest to such churches.

Bird v. Merkle, 144 N. Y. 544.

Discretionary disbursement of income is not violation of statute.

Matter of Nesmith, 140 N. Y. 609.

Whether purpose is necessary is a question of fact. *Id.*

No unlawful suspension of power of alienation arises if there is a present right to dispose of the entire interest, even if the consent of many persons is necessary.

Williams v. Montgomery, 148 N. Y. 519.

An agreement by stockholders to deposit stock, and not sell for a certain time, is not against public policy. *Id.*

A will directed a division of residuary estate into eight parts, the income of each part to be paid to testator's children during life and upon death to the lawful issue of such child; held, that eight separate and legal trusts were created, and that there was no unlawful suspension of power of alienation.

Corse v. Chapman, 153 N. Y. 466.

Trusts—*Continued.*

A trust for the benefit of children is not invalidated by the fact that the widow was given a life estate. *Id.*

A devise suspending the power of alienation of real property during the continuance of three lives is not validated by a provision authorizing the executors to sell by permission of the Supreme Court.

Fowler v. Ingersoll, 127 N. Y. 472.

A devise and bequest to an institution directed to be incorporated by the executors, void as attempting to create a perpetuity.

Booth v. Baptist Church of Christ, 126 N. Y. 215.

It is not lawful to create a perpetuity by means of a power in trust. *Id.*

Bequest to church of sum in designated bonds toward paying the debts of the church invalid, as attempting to create a perpetuity. *Id.*

Objects of trusts of personalty are not defined by statute. If a trust be created, by which the possession of personal property and the legal estate therein is vested in the trustees during the continuance of the trust, the absolute ownership of personal property is suspended within the meaning of the statute.

Underwood v. Curtis, 127 N. Y. 523.

The duration of the suspension in a trust of personal property, like a trust in real estate, must be founded on lives. *Id.*

A trust limited upon the life of testator's widow and not exceeding ten years is void. *Id.*

Where the provision for the life of the widow is separable from void provisions, the trust for her benefit will stand. *Id.*

Property left in trust during the lives of testatrix's husband and the survivor of their four children is within the prohibition.

Cross v. U. S. Trust Co., 131 N. Y. 330.

Such disposition might involve a suspension dependent upon lives not in being at death of testatrix. *Id.*

It is not presumed that a trust created by the laws of another state is contrary to our public policy. *Id.*

Absolute ownership of property and power of alienation are not suspended merely because the executor may require a period of time not measured by lives in which to execute the power of sale.

Deegan v. Wade, 144 N. Y. 573.

A direction to the executor to sell land at public auction at some convenient time in the spring following testator's death does not violate the Statute of Perpetuities. *Id.*

The power of alienation is not suspended where the *cestui que trust* has a life interest and upon his death the trust vests in a corporation.

Locke v. Farmers' Loan and Trust Co., 140 N. Y. 135.

Where the evidence and circumstances indicate the creation of several, instead of a single trust, it is the duty of the court to

Trusts—Continued.

regard them as several when that view will avoid the creation of perpetuity. *Id.*

Where a farm descends to brothers and sisters, an agreement that it shall descend to the survivors, and upon death of the last survivor descend to a nephew, is not a violation of the statute.

Murphy v. Whitney, 140 N. Y. 541.

III. STATUTE OF USES.

Section 60 of the Statute of Uses and Trusts relates to the trust estate and not to the interest of the remaindermen.

Losey v. Stanley, 147 N. Y. 560.

Provision for two funds to be held respectively for son and daughter and then divided between grandchildren, does not create a trust contrary to statute.

Allen v. Allen, 149 N. Y. 280.

A resulting trust under section 53 of the Statute of Uses and Trusts is not available as to the whole of the property to one who has paid only part of the consideration.

Schierloh v. Schierloh, 148 N. Y. 103.

Meaning of word "uses," considered.

Chvatal v. Schreiner, 148 N. Y. 683.

What trust is not among the express trusts enumerated in the statute.

Holly v. Hirsch, 135 N. Y. 590.

If the trust created is not for purposes enumerated in the section on express trusts, it will be valid as a power in trust. *Id.*

It seems that a testamentary gift to trustees to establish an institution or to distribute the revenues of the fund to sick, infirm or aged persons in reduced circumstances within a certain town or parish, is too vague and indefinite.

Hope v. Brewer, 136 N. Y. 126.

Circumstances under which the provision will be sustained. *Id.*

Under the common law a wife had capacity to dispose of, pledge or incur her estate unless restrained by the instrument of settlement.

Dyett v. Central Trust Co., 140 N. Y. 54.

The Statute of Trusts did not abridge the right given under the Revised Statutes to married women. *Id.*

IV. CHARITABLE TRUSTS.

When a secret trust involved under chapter 360 of 1860 is revived. *Trustees of Amherst College v. Ritch*, 151 N. Y. 282.

V. RESULTING TRUSTS.

A resulting trust under section 53 of the Statute of Uses and Trusts is not available as to the whole of the property to one who has paid only part of the consideration.

Schierloh v. Schierloh, 148 N. Y. 103.

Trusts—*Continued.*

VI. CONSTRUCTIVE TRUSTS.

When land of great value is conveyed for no substantial consideration and yet with no intention of making a gift, the probabilities favor the existence of reserved rights in the nature of a trust. *Rogers v. N. Y. & Texas Land Co.*, 134 N. Y. 197.

What evidence necessary in order to show a trust in an alleged donor. *Wadd v. Hazelton*, 137 N. Y. 215.

A declaration of intention to make a gift of a bond and mortgage followed by the execution of an undelivered assignment thereof, to the proposed donee, will not establish such trust. *Id.*

A trust by implication cannot be raised where it is expressly negated by will. *Clark v. Clark*, 147 N. Y. 639.

When equity will imply and enforce a trust in favor of children against a brother who received real estate upon his promise to hold it for their benefit. *Goldsmith v. Goldsmith*, 145 N. Y. 313.

A power of attorney and letter both referring to property and sufficient to define and specify the subject-matter and extent of the trust will be sufficient to establish the trust.

Hutchins v. Van Vechten, 140 N. Y. 115.

VII. TRUST ESTATE.

Husband as well as wife is entitled to support out of income of trust for support of husband.

Wetmore v. Wetmore, 149 N. Y. 520.

A *cestui que trust* is not required to establish his right by an action at law.

Spelman v. Freedman, 130 N. Y. 421.

The trust fund must bear the expenses of its administration.

Woodruff v. N. Y., Lake Erie, etc., R. R. Co., 129 N. Y. 27.

The Supreme Court has authority over a fund recovered by a trustee. *Id.*

Repairs to real estate set aside as part of the trust fund should be paid by executor and not from capital of trust fund.

Stevens v. Melcher, 152 N. Y. 551.

The provisions of a will giving trustee right to invest the proceeds of the trust estate in other real estate authorizes him to erect buildings on land. *Id.*

A beneficiary advancing money to erect a building on trust property is entitled to be credited with amount by which estate was permanently improved. *Id.*

When *cestui que trust* is not entitled to be credited with value of improvements to premises made by lessee of the premises at his own expense. *Id.*

Premiums paid by trustee for insurance required by mortgages are chargeable to income. *Id.*

Turnpikes : *See Plank Roads.*

Turnpike Companies : *See Corporations.*

Where the complaint alleged the use of rights not conferred by statute, and the evidence showed the possession of such rights by agreement with another corporation, the complaint should be dismissed. *People v. De Graww*, 133 N. Y. 254.

U.

Undertaking ; *See Appeal ; Arrest ; Attachment ; Bail Bonds ; Injunction ; Replevin.*

When an undertaking on adjournment can be required.

People ex rel. Ritzenthaler v. Higgins, 151 N. Y. 570.

An undertaking in the form prescribed for in a stay of execution given upon the appeal from an order denying a motion for a new trial does not by itself stay proceedings.

Carter v. Hodge, 150 N. Y. 532.

Such undertaking cannot be enforced where the respondent did not forbear proceedings on the faith thereof. *Id.*

Where a stay was granted to enable a party to take the evidence of a witness under a commission which was never fully executed, though he returned written answers to the commissioner ; *held*, that there was a sufficient consideration to charge the sureties on the undertaking. *Wing v. Rogers*, 138 N. Y. 361.

It seems that when an undertaking on appeal to stay proceedings upon the judgment appealed from fails for any legal reason to secure the stay, and the judgment is enforced as if the bond had not been given, the sureties cannot be held liable. *Id.*

An undertaking on arrest provided if "defendant recovers judgment, or if it is finally decided that plaintiff was not entitled to the order of arrest," *held*, that an action could be brought thereon. *Squire v. McDonald*, appeal dismissed, 138 N. Y. 554.

The liability of a surety upon an undertaking given on appeal to the General Term does not cease upon reversal by that court.

Foo Long v. American Surety Co., 146 N. Y. 251.

A *pro forma* affirmance by the Court of Appeals of the original judgment after reversal thereof by the General Term is not binding upon the surety. *Id.*

It is in the discretion of the court to allow the substitution of the new undertaking. *Dale v. Gilbert*, 128 N. Y. 625.

An appeal bond to the General Term having been given, and on appeal therefrom a second bond being executed, the sureties on both are liable for deficiency upon final judgment.

Chester v. Broderick, 131 N. Y. 549.

Where the sureties upon appeal to the Court of Appeals paid the judgment and took an assignment, the sureties on appeal to the General Term are not liable for the amount paid.

Wronkow v. Oakley, 133 N. Y. 505.

Undertaking—Continued.

The rule which restricts the liability of sureties to the strict terms of their contract does not apply to a case where the instrument shows a clear intention to come under a more enlarged obligation. *McElroy v. Mumford*, 128 N. Y. 303.

It is not the office of an undertaking on appeal to show the nature and scope of the appeal. Object of describing the judgment is to enable it to be identified. *Id.*

An undertaking on appeal from the General Term construed and liabilities of sureties fixed. *Id.*

Undue Influence ; See *Fraudulent Conveyances ; Wills.*

A person occupying a fiduciary position is bound to show that the instrument by which he was benefitted is the voluntary intelligent act of the person executing it.

Barnard v. Gantz, 140 N. Y. 249.

In order to make out undue influence, predicated upon confidential relations, the fact of such relations, must be established.

Jones v. Jones, 137 N. Y. 610.

Unlawful Assembly ; See *Criminal Law.*

What constitutes an unlawful assembly under Penal Code (§ 451, subd. 3), considered.

People v. Most, 128 N. Y. 108.

Usage ; See *Customs and Usage.*

Use and Occupation ; See *Landlord and Tenant.*

Uses and Trusts ; See *Trusts ; Wills.*

Usury.

How defense of usury must be established.

White v. Benjamin, 138 N. Y. 623.

Usury can only be founded on the loan or forbearance of money.

Meaker v. Fiero, 145 N. Y. 165.

Usury cannot be predicated upon the exaction of a *bonus* for accepting an exchange of securities for a debt. *Id.*

Purchase at a discount greater than the legal interest will void a note. *Joy v. Diefendorf*, 130 N. Y. 6.

Otherwise where a note was executed and delivered to the payee with intent to represent an obligation, although the note was obtained by fraud. *Id.*

Where the principal ratifies the usurious agreement of an agent, no recovery can be had. *Bliven v. Lydecker*, 130 N. Y. 102.

V.

Value ; *See Damages ; Evidence.*

Variance ; *See Practice.*

Vendor and Purchaser ; *See Covenants ; Deeds ; Specific Performance.*

I. LAND CONTRACTS.

II. PERFORMANCE.

III. RESCISSION.

IV. RIGHTS AND REMEDIES.

I. LAND CONTRACTS.

The title of trustee personally purchasing trust property on foreclosure of a mortgage given by creator of the trust is voidable.

Kahn v. Chapin, 152 N. Y. 305.

A purchaser of real estate refusing to take title on the ground of defects must point out the objection and give proof.

Greenblatt v. Hermann, 144 N. Y. 13.

A mere suspicion does not raise a reasonable doubt as to the invalidity of a title. *Id.*

Upon the execution of a contract for the sale of land and prior to a default on the part of the purchaser, although payment or performance of some other requirement by the purchase made a condition precedent to conveyance, there is an equitable conversion of the land, and where the vendor dies before the time of completion of the contract, in such case the proceeds pass to his executors to be distributed as personalty to the exclusion of those who are only heirs-at-law.

Williams v. Haddock, 145 N. Y. 144.

The executors of a vendor who dies before the time for completion of the contract have power to extend the time for purchase. *Id.*

Circumstances under which *held* that an assessment was to be regarded as an incumbrance within the contract to sell free from incumbrances.

Gotthelf v. Stranahan, 138 N. Y. 345.

What is insufficient to warrant a conclusion that the party was not a *bona fide* purchaser of trust property.

Anderson v. Blood, 152 N. Y. 285.

When a party will be considered a *bona fide* purchaser of land. *Id.*

A purchaser of real estate is not entitled to demand a title absolutely free from all suspicion, but may claim a marketable title ; marketable title defined.

Todd v. Union Dime Savings Inst., 128 N. Y. 636.

Vendor and Purchaser—Continued.

A contract of sale was made subject to a lease with a covenant for renewal unknown to purchaser, which justified the purchaser in refusing to take the title.

Fruhauf v. Bendheim, 127 N. Y. 587.

The grantor retains a lien upon the land until the purchase price is *bona fide* and actually paid.

Maroney v. Boyle, 141 N. Y. 462.

A purchaser of land at an execution sale who has paid the purchase price and received the sheriff's certificate of sale is entitled to protection against an outstanding and unknown lien for purchase money. *Id.*

II. PERFORMANCE.

A purchaser, under agreement to buy land free from incumbrances, may, by his conduct, waive a literal performance.

Webster v. Kings County Trust Co., 145 N. Y. 275.

Tender on the trial of an action for specific performance and deposit with the clerk of the court of a deed executed by all the vendors is a good delivery in escrow. *Id.*

When restrictions cannot be enforced by vendor.

Woodhaven Junction Land Co. v. Solly, 148 N. Y. 42.

An accidental trespass upon part of lands to be conveyed furnishes no excuse for refusal to perform.

Horton v. Bauer, 129 N. Y. 148.

III. RESCISSION.

What does not dispense with the necessity of a tender by purchaser and demand of performance as a condition precedent to the action to recover money paid.

Ziehen v. Smith, 148 N. Y. 558.

A purchaser who rejects the title cannot at the same time claim to recover the value of rent which by the terms of the agreement he was entitled to receive.

Miele v. Deperino, 135 N. Y. 618.

Where purchaser has been guilty of fraud, vendor may rescind or sue for damages.

Yeomans v. Bell, 151 N. Y. 230.

A vendor of real estate from which he is parted by false representations of value of stock can recover the difference between the actual and par value of such stock. *Id.*

IV. RIGHTS AND REMEDIES.

The act of the purchaser, pending examination of the title, in selling to the vendor's husband certain fixtures attached to the property, is not a waiver of defects in the title.

Kountze v. Helmuth, 140 N. Y. 432.

Statements of purchaser to a third person to the effect that the title is satisfactory will not amount to a waiver of defects. *Id.*

Vendor and Purchaser—*Continued.*

Before the contract for the purchase of real property is closed, the client is not chargeable with knowledge of facts shown by documents which have been submitted to his attorney. *Id.*

The affirmance by the Court of Appeals of an order, made on application of a depositor in a savings bank, for leave to intervene in proceedings for the sequestration of its property and to have a sale of its real estate to certain of its trustees set aside, adjudging that such sale was valid, settles the validity of the title. *Webster v. Kings County Trust Co.*, 145 N. Y. 275.

Any right existing in another to use the land, or whereby the use of the owner is restricted, is an incumbrance within the legal meaning of the term. *Foster v. Scott*, 136 N. Y. 577.

What would create an incumbrance upon property which would relieve a purchaser. *Id.*

A statute, however, in attempting to create such incumbrance, while leaving it optional with the public authorities whether to appropriate the land or not, violates the provisions of the Constitution. *Id.*

When the acts of the parties to contract to sell land constitute in law a waiver by the purchaser of performance of the contract on the part of the vendor at the time stipulated.

Kent v. Church of St. Michael, 136 N. Y. 10.

Circumstances under which, *held*, a perpetual incumbrance existed on property which would relieve the purchaser.

O'Neil v. Van Tassel, 137 N. Y. 297.

When purchaser of real property at public sale for value is not chargeable with fraud on the part of the grantor so as to impair or avoid his title.

Jacobs v. Morrison, 136 N. Y. 101.

A purchaser will not be relieved on account of a bare possibility or mere suspicion that there is fraud in the conveyance. *Id.*

What facts sufficient so that specific performance of such agreement was properly decreed.

Roberge v. Winnie, 144 N. Y. 709.

Purchaser from trustees is entitled to receive a marketable title free from reasonable doubt.

Lahey v. Kortright, 132 N. Y. 450.

When specific performance for contract for the purchase of land will not be decreed where premises encroach on other land.

McPherson v. Schade, 149 N. Y. 16.

Reasonable diligence in the performance of a contract is requisite for relief. *Schmidt v. Reed*, 132 N. Y. 108.

Prejudicial intervening circumstances may relieve a party from performance during default. *Id.*

A provision not to assign without vendor's consent is not broken when transfer is made by operation of law.

Higgins v. McConnel, 130 N. Y. 482.

Verification ; *See Practice.*

Vessels ; *See Carriers ; Demurrage ; Freight ; Navigation ; Ships and Vessels.*

Veterans ; *See Civil Service.*

The position of assistant warrant clerk in the office of the comptroller of Brooklyn is a confidential position ; the incumbent may be discharged without cause.

People ex rel. Crummev v. Palmer, 152 N. Y. 217.
A person appointed to an office without having passed a civil service examination may be discharged without notice or hearing.

People ex rel. Hannan v. Board of Health, 153 N. Y. 513.
The word "incompetency" as used in the act means incapacity.
Id.

Chapter 344 of 1895, providing that when applicant for position is an honorably discharged soldier or sailor of the late war, etc., is in conflict with section 9 of article 5 of the Constitution.

Matter of Keymer, 148 N. Y. 219.
The Veteran Acts do not prevent a municipal corporation from abolishing offices in good faith.

People ex rel. Corrigan v. Mayor, 149 N. Y. 215.
The warden of the city prison of New York is a city officer within the meaning of the Veteran Act of 1892.

People ex rel. Fallon v. Wright, 150 N. Y. 444.
An honorably discharged Union soldier may be removed for incompetency.

People ex rel. Fonda v. Morton, 148 N. Y. 156.
Provisions of Laws 1887, chapter 706, as amended by Laws 1888, chapter 261, making provision for indigent veterans to be distributed through grand army posts, considered.

People ex rel. Crammond v. Common Council, 136 N. Y. 489.

Villages ; *See Municipal Corporations.*

When a village is liable for water furnished under circumstances from which a contract can be implied.

Port Jervis Water Works Co. v. Village of Port Jervis, 151 N. Y. 111.

When the decision of the board of trustees of a village upon a claim is not final so as to bar an action. *Id.*

Where it is within the discretion of the board of trustees whether the police justice should receive a salary or fees, a court has no power to decide.

People ex rel. Goring v. President, etc., of Village of Wappinger's Falls, affirmed, 144 N. Y. 616.

Villages—Continued.

Elections held to determine the question of incorporation to proposed village must be conducted under General Village Act.

Matter of Taylor, 150 N. Y. 242.

An incorporated village which maintains water-works is not liable for failure to keep system in condition.

Springfield Fire & Marine Ins. Co. v. Village of Keeseville, 148 N. Y. 46.

It seems that the exercise of the power to lay out and open streets is *quasi-judicial* and discretionary.

Seymour v. Village of Salamanca, 137 N. Y. 364.

When village incorporated under chapter 291 of 1870 could not avail itself of formal omission of trustee to take step necessary to make an improvement as a defense to an action of negligence brought against it.

Id.

The provision of the General Village Act authorizing boards of supervisors to extend boundaries of villages, applies only to villages incorporated under the general act.

People ex rel. Kittredge v. Mabie, 142 N. Y. 343.

The provisions of chapter 308 of 1884, conferring upon trustees and officers of villages created by special charter, certain powers construed.

Id.

When an assessment for taxation levied by village authorities is void.

Id.

Vinegar; See Constitutional Law.

Section 4 of chapter 515, Laws 1889, prohibiting the manufacture of any vinegar containing an artificial coloring matter, is constitutional.

People v. Girard, 145 N. Y. 105.

Voluntary Conveyances; See Fraudulent Conveyances; Gift; Husband and Wife.**W.****Wager; See Betting and Gaming.****Waiver; See Bills and Notes; Contracts; Estoppel; Insurance.**

Acceptance of a lease amounts to a waiver of contest of lessor's title.

Böhn v. Hatch, 133 N. Y. 64.

Warehousemen; See Bailments; Carriers.

When a warehouse company is not estopped from denying receipt

Warehousemen—Continued.

signed by the president when no by-law authorized him so to do.

Bank of N. Y. Nat. Banking Assoc. v. American Dock & Trust Co., 143 N. Y. 559.

It seems that under the general authority of the president the company would be liable on a receipt issued in favor of a third person. *Id.*

Penal Code, section 663, is designed to protect *bona fide* holders of negotiable warehouse receipts.

Burnham v. Cape Vincent Seed Co., 142 N. Y. 169.

When a warehouseman may maintain an action on acceptance against the party who receives the property as a pledge to secure payment of a draft. *Id.*

A *bona fide* pledger of a receipt issued by the president of a warehouse company in his own favor must show that implied authority to issue receipts for his own goods had been conferred on him.

Hanover Nat. Bk. v. American Dock & Trust Co., 148 N. Y. 612.

Such authority may be shown by acquiescence of the directors in previous similar actions. *Id.*

Directors of a warehouse company are chargable to a *bona fide* purchaser of a receipt issued in its name with knowledge of entries in its book which could have been disclosed by inspection. *Id.*

Liability of a warehouse company upon a certificate made out by its president in favor of himself, who had authority to issue certificates in favor of third parties, considered.

Corn Exchange Bk. v. American Dock & Trust Co., 149 N. Y. 174.

A negotiable warehouse receipt for a specified number of barrels of "Portland cement," *held*, not to imply a warranty of the contents of the barrels. *Dean v. Driggs*, 137 N. Y. 274.

Representations in a bill of lading or warehouse receipt which should be held to be warranties, should be confined usually to those which the carrier or warehouseman may ordinarily be assumed to have knowledge of. *Id.*

The issue of a receipt which merely misdescribes the quality of the contents of the packages, is not a violation of the provisions of the factor's act against issuing receipts for goods not actually received. *Id.*

Warranty ; See Covenants ; Guaranty ; Insurance ; Sales ; Vendor and Purchaser.

There is an implied warranty that a judgment exists on a sale of a judgment which vendor has levied upon and bought at an execution sale. *Flandrow v. Hammond*, 148 N. Y. 129.

How failure of title in such case may be shown. *Id.*

Warranty—*continued.*

A manufacturer who sells goods made by himself impliedly warrants them free from latent defects which arise from process of manufacture which made them unmerchantable.

Carleton v. Lombard, Ayres & Co., 149 N. Y. 137.

Liability for breach of such warranty survives acceptance where the defects are not apparent. *Id.*

It is admissible to prove that manufacturer knew the destination of the goods and question of his liability for latent defects rendering the goods unfit for transportation. *Id.*

When a warranty survives acceptance of the goods.

Bierman v. City Mills Co., 151 N. Y. 482.

When implied warranty that articles shall be merchantable arises. *Id.*

What representations to vendee by the seller of stock are sufficient to justify a finding that the statement as to value was intended to be a warranty. *Titus v. Poole*, 145 N. Y. 414.

A representation by a vendor as to value, which is intended as a warranty may be enforced as a warranty. *Id.*

Waste; *See Landlord and Tenant.*

Watercourses; *See Easements; Navigable Waters; Riparian Owners.*

The conveyance to a railroad of a strip of land on both sides of a high-water mark, considered.

Central, etc., R. R. Co. v. Aldridge, 135 N. Y. 83.

One who has acquired by agreement the right to take water from a spring upon the land of another, has no right to dig out such spring to a depth lower than is necessary to conveniently take the water from it. *Furner v. Seabury*, 135 N. Y. 50.

When a contractor with the city is not liable to the proprietor of adjacent lands for damages resulting from drainage of water of a pond. *Covert v. Cranford*, 141 N. Y. 521.

In such a case the sole remedy is against the city. *Id.*

The contractor is liable for damages for the interruption of the flowing of the stream. *Id.*

Riparian rights do not depend upon beneficial uses.

N. Y. Rubber Co., v. Rothery, 132 N. Y. 293.

The right to recover nominal damages for a diversion of water is substantial. *Id.*

Where the testimony of experts shows a condition to have been impossible, it overrules the evidence of plaintiff.

Newland v. Hudson River Water Power, etc., Co., 133 N. Y. 687.

An owner is entitled to damages for injury to his water front in the absence of exercise of eminent domain.

Rumsey v. N. Y. and New England R. R. Co., 133 N. Y. 79.

Watercourses—*Continued.*

Only a mere usufructuary right can be acquired in running water.
Sweet v. City of Syracuse, 129 N. Y. 316.

Watertown; *See Municipal Corporations.*

All the powers in relation to opening new streets conferred upon the common council by the charter of the city of Watertown were transferred to the board of public works by chapter 180, Laws 1891. *Matter of Board of Public Works*, 144 N. Y. 440.

Water-Works.

The power conferred on water companies by chapter 566 of 1890 entitles companies to lay a pipe to connect two of its mains which terminate in "dead ends."

Village of Pelham Manor v. New Rochelle Water Co., 143 N. Y. 532.

A water-works company cannot proceed in the condemnation of real estate before the execution of its contract to supply a municipality with water.

Citizens' Water Works Co. v. Parry, affirmed without opinion, 128 N. Y. 669.

A town may enter into a contract to secure water.

Nicoll v. Sands, 131 N. Y. 19.

Where the terms of the contract are just and fair and honorably performed, the contract is valid. *Id.*

An agreement to compensate highway commissioners for supervision of contract does not make it invalid. *Id.*

Where the statute permitting consolidation was repealed three days after an agreement to consolidate, the agreement is valid.

Cameron v. N. Y. & Mt. Vernon Water Co., 133 N. Y. 336.

Wharves; *See New York City.*

Although a lessee of wharfage privileges secures removal of obstruction by *mandamus*, he may recover damages which he has sustained by reason of such obstruction.

Flandreau v. Elsworth, 151 N. Y. 473.

Section 798 of the Consolidation Act fixing double rates of wharfage on certain vessels applies to oyster barges. *Id.*

Circumstances under which, *held*, that a lease of "wharfage which may arise, accrue or become due for the use and occupation in a manner and at the rates prescribed by law," was not a lease of the wharf itself. *Eastman v. Mayor*, 152 N. Y. 468.

Measure of damages in case the city fails to put lessee of warranty rights in possession. *Id.*

When lessee may recover rentals paid city when he is prevented from using wharf. *Id.*

Right of owners of wharf and power of New York city authorities

Wharves—Continued.

to erect new wharf in front of owners' wharf, discussed and explained. *Langdon v. Mayor, etc., of N. Y.*, 133 N. Y. 628.
Where a person hiring suffers loss from a defect, which the owner knows to exist, the owner is chargeable.

Vroman v. Rogers, 132 N. Y. 167.

Wills; See Devise; Executor and Administrator; Legacy; Remainders; Surrogate's Court; Trusts.

I. EXECUTION AND REVOCATION.

II. PROBATE.

III. SUITS TO CONSTRUE AND SET ASIDE.

IV. CONSTRUCTION.

V. WHO TAKE.

I. EXECUTION AND REVOCATION.

Where there is a full attestation clause supported by the testimony of one of the witnesses, the court may admit the will to probate, although the other witnesses contradicted it.

Matter of Bernsee, 141 N. Y. 389.

The attesting witness should see the testator subscribe his name or should hear him acknowledge that the signature was his.

Matter of Laudy, 148 N. Y. 403.

A will of a married woman who subsequently becomes a widow is not revoked by her re-marriage.

Matter of McLarney, 153 N. Y. 416.

The Married Woman's Act of 1849 did not extend the rule as to wills of unmarried women to such a case. *Id.*

The birth of a child after the execution of a will renders it inoperative as to that portion which, in case of intestacy, would have been distributed to it as next of kin.

Matter of Murphy, 144 N. Y. 557.

Chapter 360 of 1860, prohibiting a person from devising more than one-half of the estate for benevolent corporations, applies to a secret trust.

Trustees of Amherst College v. Ritch, 151 N. Y. 282.

The protection afforded by chapter 360 of 1860 can only be invoked by the person's name in the statute. *Id.*

When a secret trust involved under chapter 360 of 1860 is revived. *Id.*

The provision that a will made by an unmarried woman is revoked by her marriage applies to a widow.

Matter of Kaufman, 131 N. Y. 620

Marriage of a widow revokes her will.

Croner v. Cowdrey, 139 N. Y. 471.

What is not an exercise of a power of disposition granted by a former will.

Matter of Langdon, 153 N. Y. 6.

Wills—Continued.

The attestation clause is always some proof of the due execution of the will. *Matter of Nelson*, 141 N. Y. 152.

The request to sign as a witness is sufficient, if made by the person superintending the making of a will in the hearing of the testator with his silent permission. *Id.*

Facts which do not show want of testamentary capacity or undue influence. *Matter of Snelling*, 136 N. Y. 515.

Even though donee may create illegal estate, a general power of appointment in the future is not void.

Hillen v. Iselin, 144 N. Y. 365.

An appointment of an estate by the donee of a power to appoint a will is invalid so far as it transcends the power. *Id.*

An execution of such a power will not be defeated because of some provision in excess of the power which can be eliminated without disturbing the general scheme of the appointment. *Id.*

A power to appoint to the donee's child or "children, or his, her or their descendant or descendants," construed. *Id.*

II. PROBATE.

When a will is not signed at the end within the meaning of the statute. *Matter of Whitney*, 153 N. Y. 259.

A decree of a surrogate denying the probate of a will is not conclusive on devisee although he appeared.

Corley v. McElmeel, 149 N. Y. 228.

The General Term of the Supreme Court on appeal from a probate decree has the same power to determine facts as the surrogate had. *Matter of Laudy*, 148 N. Y. 403.

Where the General Term reverses a surrogate's decree on a question of fact, it must direct a trial by jury unless the court could properly take the facts from the jury and determine the question as one of law. *Id.*

Where complete relief can be obtained in the Surrogate's Court, the court has authority on that ground in the exercise of its discretion to decline jurisdiction.

Underwood v. Curtis, 127 N. Y. 523.

When a surrogate is satisfied that testator had not mental capacity to make a will, and was unduly influenced, he should have refused probate of the will.

Matter of Bartholick, 141 N. Y. 166.

The courts of this state cannot confer title to personal property under a foreign will except in accordance with the law of the country where the owner was domiciled when he made the will. *Dammert v. Osborn*, 140 N. Y. 30.

It seems that the courts may remit the property or its proceeds to the home tribunals. *Id.*

In determining the validity of a will, where the domicile of the

Wills—Continued.

- testator in another country is conceded, the fact of the testator being a citizen of this state is immaterial. *Id.*
- When property should be remitted to the jurisdiction of the courts of the domicile of the testator. *Id.*
- A bequest in the will of the testator valid under the laws of his domicile is valid in this state. *Id.*
- It is no objection to the probate of a will of real and personal property found to have been properly executed by a competent testator, that it attempts to give the entire property to the government of the United States. *Matter of Merriam*, 136 N. Y. 58.
- The decree of probate in such case does not conclude the heirs-at-law on the question of the invalidity of the attempted devise. *Id.*
- And the record is not even presumptive evidence of the validity of the devise. *Id.*
- An instrument propounded as a will and which was not subscribed at its end by the testatrix, *held*, not sufficiently proven under laws of another state where will might be signed in body. *Matter of Booth*, 127 N. Y. 109.
- Evidence of testatrix's declaration to one of the subscribing witnesses, "This is my will; take it and sign it," standing alone, is insufficient to sustain a finding or verdict that the name written by her in the first line of the document was there written with intent that it should have effect as her signature in final execution of a will. *Id.*
- A decision of a surrogate construing a disposition of personal property is not conclusive in an action to construe the will as to real estate. *Corse v. Chapman*, 153 N. Y. 466.
- Where the will gives a power of sale as to unproductive property, the like power as to unproductive property is implied. *Id.*
- A trust for the benefit of children is not invalidated by the fact that the widow was given a life estate. *Id.*
- A will directed a division of residuary estate into eight parts, the income of each part to be paid to testator's children during life, and upon death to the lawful issue of such child; *held*, that eight separate and legal trusts were created, and that there was no unlawful suspension of power of alienation. *Id.*
- When a will directs the property to be kept together as long as possible, and the codicil creates a trust for the benefit of the children of the son during the life of latter, and makes him trustee, the son is trustee of the net income of share and not of the share itself. *Id.*

III. SUITS TO CONSTRUE AND SET ASIDE.

- What does not constitute waiver of right to have question of validity of will tried by jury. *Corley v. McElmeel*, 149 N. Y. 228.

Wills—*Continued.*

A beneficiary who is taking the benefit of the provisions of the will cannot repudiate its obligations.

Gibbins v. Campbell, 148 N. Y. 410.

An action under section 2653a of the Code cannot be maintained by one claiming in hostility to the will.

Lewis v. Cook, 150 N. Y. 163.

Where will provided that any beneficiary contesting will should lose his share, the contest by a guardian *ad litem* will not interfere with infant's interest.

Bryant v. Thompson, appeal dismissed, 128 N. Y. 426.

Though infant was present and testified as a witness upon the trial of the contest instituted by the guardian *ad litem*, the case is not changed.

Id.

An action cannot be maintained by an heir-at-law and next of kin of a testator to adjudge invalid certain provisions of the will where these gifts if void would pass to others than the plaintiff.

Onderdonk v. Onderdonk, 127 N. Y. 196.

Case in which *held* that complaint stating the facts failed to set forth a cause of action, since no interest of trust fund was given children.

Harvey v. Brislin, 143 N. Y. 151.

A complaint to construe will was dismissed since the surrogate had jurisdiction, and having first obtained it was entitled to retain and exercise it.

Garlock v. Vandevort, 128 N. Y. 374.

It is competent for the surrogate to decide the place of residence of the beneficiary under a bequest to the children resident in a certain state.

Id.

In action not brought in good faith costs were properly charged upon the plaintiff personally.

Id.

There is no inherent power invested in courts of equity in the construction of devises as an independent branch of jurisdiction.

Mellen v. Mellen, 139 N. Y. 210.

Where it appeared that plaintiff who sought a construction of a will was only grantee of her husband who was a devisee, *held*, that the action could not be maintained under Code Civil Procedure (§ 1866).

Id.

IV. CONSTRUCTION.

A provision in a will that no deduction should be made from the share of any child for advances made, does not apply to loans made by testator after execution of will.

Rogers v. Rogers, 153 N. Y. 343.

Where a will creating a trust to secure an annuity during the minority of testator's youngest son and no longer, shares of the children vest when the youngest son attains his majority.

Clark v. Clark, 147 N. Y. 639.

Wills—Continued.

A trust by implication cannot be raised where a will expressly negatives any such intention. *Id.*

A devise to testator's three sisters constitutes a tenancy in common. *Matter of Kimberly*, 150 N. Y. 90.

Question of description of property of two farms.

Chace v. Lamphere, 148 N. Y. 206.

Provision for two funds to be respectively for son and daughter and then divided between grandchildren, does not create a trust contrary to statute. *Allen v. Allen*, 149 N. Y. 280.

Will construed that all property left, vested in a minor as soon as paid in, and upon his death during minority the accumulations passed to his personal representatives.

Smith v. Parsons, 146 N. Y. 116.

A bequest to testator's widow of income "without restraint, deduction or interference," construed.

Matter of James, 146 N. Y. 78.

In construing a will the intention of the testator is to govern. *Id.*

A direction to the executor to sell the real estate as soon as practicable and divide among persons named is imperative.

McDonald v. O'Hara, 144 N. Y. 566.

A contingency which will render a legacy inalienable must be one which relates to the person who will take.

Sawyer v. Cubby, 146 N. Y. 192.

A trust to pay income to the beneficiary until he is 35 years old and then to pay principal to him is not unlawful. *Id.*

A bequest of "cash funds" in a bank includes only the balance on deposit to testator's credit at his death.

Montagnani v. Blade, 145 N. Y. 111.

A provision of a will making testator's son and daughter arbitrators in case of a dispute between the beneficiaries, construed.

Id.

A devise to testator's wife in lieu of dower, considered.

Nelson v. Brown, 144 N. Y. 384.

The court must give such construction as will effectuate the general intent of the testator. *Tilden v. Green*, 130 N. Y. 29.

Ineffectual provisions may be resorted to for the purpose of ascertaining such intention. *Id.*

The construction will be given which renders the will operative instead of invalid. *Id.*

The testator's intent, as manifested by the language used, must be effectuated. *Id.*

It is sufficient if beneficiaries are so described as to be ascertained in the future when the right accrues to receive the gift. *Id.*

What is sufficient to constitute a general residuary clause although followed by another bequest.

Morton v. Woodbury, 153 N. Y. 243.

In an important residuary clause, special words must be used. *Id.*

Wills—Continued.

Where there is a disposition of a part of the residue and it fails, it will devolve as property undisposed of. *Id.*

Case where a provision in terms a condition that the devisee pay certain legacies, *held*, to import a covenant.

Cunningham v. Parker, 146 N. Y. 29.

A direction to the executor to pay debts does not charge the debts upon land devised to executor. *Id.*

Executors empowered in their discretion to sell the real estate interests of the estate, are entitled to reimburse themselves for debts paid by them in excess of the personal estate.

Matter of Bolton, 146 N. Y. 257.

A holographic will construed.

Hopkins v. Kent, 145 N. Y. 363.

Will devising premises to testator's two daughters during their life, and at their decease to others, share and share alike, the child or children of a deceased child taking the share which his parent would have taken if living, construed.

Nelson v. Russell, 135 N. Y. 137.

The words "from and after," used in a gift in remainder following a life estate, construed. *Id.*

The presumption is that a testator intends that his dispositions are to take effect either in enjoyment or interest at the date of his death. Words of survivorship and gifts over on the death of the primary beneficiary are construed as relating to the death of the testator. *Id.*

Residuary clause of a holographic will, construed.

Matter of Miner, 146 N. Y. 121.

Absolute ownership of property and power of alienation are not suspended merely because the executor may require a period of time not measured by lives in which to execute the power of sale.

Deegan v. Wade, 144 N. Y. 573.

A direction to the executor to sell land at public auction at some convenient time in the spring following testator's death does not violate the Statute of Perpetuities. *Id.*

A gift to a non-existent institution to be incorporated after testator's death, is void unless limited upon two lives in being.

People v. Simonson, 126 N. Y. 299.

The question of validity is to be determined by a consideration of whether the conditions of the law are met as to the vesting of estates. *Id.*

The fact that a corporation of the kind mentioned by the testator could be incorporated immediately upon his death by proceedings taken under the general law, will not save the provision where the specific directions of the testator require the corporation to be formed by special act. *Id.*

The words used may depend upon the scheme of the will.

Matter of Logan, 131 N. Y. 456.

Wills—Continued.

Where a will creates a number of equal legacies absolutely and a similar single one conditionally, the residue is to be divided accordingly. *Id.*

What is necessary to destroy the legal effect of writing signed by testator and filed by him for preservation.

Trustees of Amherst College v. Ritch, 151 N. Y. 282.

When a secret trust is created by parol. *Id.*

The provisions of a will giving trustee right to invest the proceeds of the trust estate in other real estate authorizes him to erect buildings on land. *Stevens v. Melcher*, 152 N. Y. 551.

When the use of the capital in the middle of a sentence should be regarded as accidental. *Kinkele v. Wilson*, 151 N. Y. 269.

A bequest of interest on a specified sum to testator's widow in lieu of dower, does not charge *corpus* of estate for deficiency if income fell short of 6 per cent.

Matter of Dewey, 153 N. Y. 63.

When executors could not be required to account as trustees.

Matter of Collins, 144 N. Y. 522.

A clause of will as to "residuary estate," construed paying to residuary legatees in preference to specific legatees.

United States Trust Co. v. Black, 146 N. Y. 1.

Bequest *held* upon its face absolute and not upon any trust, where, after absolute bequests, testatrix devised to trustee to carry her wishes into effect. *Matter of Keleman*, 126 N. Y. 73.

Where a will directs the executor to sell all of the real estate, in his discretion, conversion must be deemed to take place at the testator's death. *Underwood v. Curtis*, 127 N. Y. 523.

Provisions of will relating to disposition of property lapsing by reason of invalidity of any of its provisions construed, and is effectual to prevent a disinherited son of the testator from maintaining an action to question the validity of some of the disposing provisions of the will.

Onderdonk v. Onderdonk, 127 N. Y. 196.

The rule that when there is a devise to one person, and, in case of his death, to another, the contingency is a death in the lifetime of the testator, and has no application when the first devisee takes a life estate.

Fowler v. Ingersoll, 127 N. Y. 472.

Such rule only applies when the context of the will affords no indication of an intent on the part of the testator other than that indicated by the words of absolute gift followed by a gift over in case of the death of the first-named devisee. *Id.*

Where a devise is in trust to pay the income to three persons during their lives in unequal shares, with a gift over upon their death to their respective children in equal shares, an intent is shown that the gift in remainder shall not vest in possession until the termination of the last of the three lives. *Id.*

Wills—Continued.

Where there is an absolute gift in a will, the latter part of the will must show an equally clear intention to qualify such gift in order to be imperative.

Clay v. Wood, 153 N. Y. 134.

An expression by the testator that it was his "desire and request" that his wife provide for and educate a child does not qualify an absolute gift to his wife.

Id.

When a testator authorizes his executors to sell and convert into money his realty for a specific purpose, which fails, the power is extinguished and the land, unless devised, descends to the heir.

Sweeney v. Warren, 127 N. Y. 426.

When will provides that in case of failure of the securities to realize the amount of the annuities, the deficiencies be made out of the residuary estate, the remaindermen need not devote their own funds to the payment of the annuities.

Booth v. Baptist Church of Christ, 126 N. Y. 215.

Bequests to charitable societies on condition that each should pay annuities of specified amounts equal to the accruing interest to certain persons for their lives, sustained, though societies would have to give funds to persons not prescribed in their charters.

Id.

Under the rule that an unattested paper, which is of a testamentary nature, cannot be taken as a part of the will, even though referred to in that instrument, *held*, that an instrument, attempting to convert into a specific legacy of certain stock one which by the terms of the will was either general or at most demonstrative, was testamentary in its nature and could affect or modify the will.

Id.

A residuary clause by which the testator gave all the rest and residue of his estate to three societies named, "equally, share and share alike," is general and absolute, and includes all void legacies.

Id.

When there is no way to indicate the difference between conditions precedent and subsequent, and the question is always one of intention.

Id.

When technical words in a will may be construed in their common and popular sense.

Lawton v. Corlies, 127 N. Y. 100.

Loose moneys do not embrace the proceeds of real estate directed by the will to be sold.

Matter of Werry, affirmed without opinion, 127 N. Y. 667.

A codicil changing the devisees of property charges with the payment of an annuity to testator's widow, did not, in the absence of express language to that effect, revoke such charge in will.

Redfield v. Redfield, 126 N. Y. 466.

The rule also applies that an expressed intention to make a change in a will in one particular negatives an intention to alter it in any other respect.

Id.

Wills—Continued.

The charge extended to the share of the added devisee as well as that given to the one originally named. *Id.*

Where a will is in fact contrary to the dictates of the natural affections and is in all circumstances unnatural in its dispositions, its provisions are evidence of mental defect which may require explanation. *Matter of Budlong*, 126 N. Y. 423.

What may constitute undue influence and fraud. *Id.*

Provisions of will construed to give executors powers of sale generally unlimited and unrestricted, which were not inconsistent with the devise of a vested estate in the remaindermen.

Cussack v. Tweedy, 126 N. Y. 81.

What forms part of the residuary estate.

Matter of Allen, 151 N. Y. 243.

Inartificially drawn will, giving all testator's real and personal estate to his wife, construed.

Matter of McClure, 136 N. Y. 238.

A later provision "in case any of the gifts or devises hereinbefore given shall be adjudged void or illegal for any reasons, then I give and devise the property mentioned and described in such void or illegal gifts and devises to my executors hereinafter named in trust for them to carry out and accomplish the end and objects designed by me in such void and illegal gifts and devises," applies to the residuary as well as the other prior clauses. *Id.*

The use of the word "money" in a gift in a will must be construed in view of the context.

Sweet v. Burnett, 136 N. Y. 204.

There is no absolute rule which prohibits the vesting of legacies immediately upon death of the testator.

Bowditch v. Ayrault, 138 N. Y. 222.

A provision directing the executors as soon as may be conveniently done after testator's death to sell and convert into money all his real estate, operates to subject real estate to the operation of the rules of law governing the devolution of personal property.

Hope v. Brewer, 136 N. Y. 126.

When gift of personal property to a foreign charity in trust, contained in a valid will, will be sustained. *Id.*

Circumstances under which rule that a testamentary disposition of property invalid at the domicile of the owner is invalid everywhere applies. *Id.*

Will under which, *held*, that legacies were a charge upon the land.

Hogan v. Kavanaugh, 138 N. Y. 417, reargument denied, 139 N. Y. 620.

Wherever a power or authority to sell is given without limitation, the authority is to be deemed imperative, and a direction to sell will be implied. *Matter of Gantert*, 136 N. Y. 106.

Wills—Continued.

As to instrument drawn in Germany, *held*, that the paper was not executed as a will which would pass the title to real estate in New York. *Vogel v. Lehritter*, 139 N. Y. 223.

A case in which, *held*, that power of sale given to widow was for her benefit as well as the remainderman, and survived the death of the latter. *Cotton v. Burkelman*, 142 N. Y. 160.

A gift of a specified sum, which the will provides may be invested in certain securities, is a general legacy.

Matter of Hodgman, 140 N. Y. 421.

Where a legacy to testator's wife was directed to be paid as soon after his death as convenient to executors, the widow expecting the payment of such legacy more than a year after the death is not precluded from claiming interest. *Id.*

The general rule is that the general residuary clause will include a lapsed devise. *Smith v. Smith*, 141 N. Y. 29.

Before a gift to executors can be held to vest in them individually, the intention should be perfectly apparent.

Forster v. Winfield, 142 N. Y. 327.

A will under which, *held*, that executors did not take the title to testator's real estate as individuals. *Id.*

Devise of fee and powers, considered.

Cahill v. Russell, 140 N. Y. 402.

In determining whether a power of sale was intended, it is important to ascertain whether the general scheme of the will seems to require it. *Id.*

A gift to a stranger of "all debts, dues, etc.," *held*, not to exclude bond and mortgage of the legatees upon the property which had passed to grantee, who had in fact assumed the payment of such mortgage.

Matter of Lee, 141 N. Y. 58.

In the construction of residuary clauses the intention of the testator is to be followed.

Lamb v. Lamb, 131 N. Y. 227.

A broad rather than a restricted construction is favored. *Id.*

The inappropriate use of words is not material. *Id.*

Rule is that where there is no gift except by a direction to executors to pay the gift does not vest in the beneficiary until that time arrives, but is subordinated to the intent of the testator as gathered from the entire instrument.

Matter of Seebeck, 140 N. Y. 241.

A provision directing executors to let the premises and pay a sum to a sister and balance to her children, where the residuary clause gives the estate to children, vests the real estate in the children at the death of the testator. *Id.*

Will *held* to contain no unlawful power of alienation.

Bird v. Pickford, 141 N. Y. 18.

It is not enough to condemn a provision that the power of ownership may be suspended for three lives, provided such suspension

Wills—Continued.

be bounded by two designated lives in being at the time of the death of testator. *Id.*

The rule of construction that when there is a bequest to one person absolutely, and in case of his death without issue to another, the contingency referred to is a death in the lifetime of the testator, has only a limited operation.

Matter of Denton, 137 N. Y. 428.

The words of a will attached to a gift are to be construed according to the testator's intention.

Riker v. Leo, 133 N. Y. 519.

Testator directed his executors and trustees to set apart and invest a sum certain or one-third of the personal estate, as his widow might elect, in writing, and to pay her the income thereof during her life; *held*, that an election so made by her would not relate back.

Duclos v. Benner, 136 N. Y. 560.

Nor is the widow in such case entitled to claim legal interest upon the sum specified, where that amount has not been earned by the trust of which she has had the management. *Id.*

Where a will indicates an intent to devise certain remainders after the termination of a trust, a direction that the trusts convey, transfer, pay over and deliver to the remaindermen is not the foundation of the title of the devisees.

Campbell v. Stokes, 142 N. Y. 23.

The limitation in 1860, chapter 360, of the right of benevolent societies to take to one-half of the estate requires the will to be read as if the statute restriction was a part of it.

Matter of Walker, 136 N. Y. 20.

A devise in fee to testator's widow, *held*, to confer on her a power to dispose of the property by will.

Matter of Gardner, 140 N. Y. 122.

It seems that such power to dispose is not qualified by words expressing an expectation that if the widow makes the will, the entire property shall not go out of testator's own family. *Id.*

Will in construction of which, *held*, that there was no ambiguity in the will which called for the admission of any evidence.

Bradhurst v. Field, 135 N. Y. 564.

Where the gift of the immediate income is made it indicates an intention to vest the *corpus* from which such income was derived.

Schermerhorn v. Cotting, 131 N. Y. 48.

The power of alienation may be suspended for period of two lives in being. *Id.*

Where the income and principal is given equally from one fund to be kept intact, several and independent trusts may be created.

Id.

A codicil will not operate beyond the clear import of its language.

Viele v. Keeler, 129 N. Y. 190.

Wills—Continued.

Legacies bequeathed in a will of personalty only cannot become a charge upon realty afterwards acquired.

Morris v. Sickly, 133 N. Y. 456.

Personal property is subject to the law of the owner's domicile.

Cross v. U. S. Trust Co., 131 N. Y. 330.

Where the illegal provisions creating trusts in a will cannot be separated from the legal, the entire will is invalid. *Id.*

A cause of action or right to property created by statute of another state, if similar in character to one in this state, may be enforced in this state. *Id.*

A trust created in another state under provisions similar to those of this state is not presumed invalid. *Id.*

An action cannot be maintained in this state to declare invalid a testamentary disposition of personalty made in another state. *Id.*

In construing wills the court may transpose, reject or insert words so that it will express the intention of the testator.

Starr v. Starr, 132 N. Y. 154.

This rule applied to give executors power to rent the whole premises. *Id.*

A will providing for vesting of estate at certain time of age of devisee, considered.

Dimmick v. Patterson, 142 N. Y. 322.

Where the power of alienation is unlawfully suspended the trust is void.

Matter of Christie, 133 N. Y. 473.

The express restraint on the power of sale cannot be stricken out to support the trust. *Id.*

Prior to 1830 a person could only devise such lands as he was seized and possessed of at time of publishing his will.

Dodge v. Gallatin, 130 N. Y. 117.

If he were in possession under a contract to purchase, such rights would pass by a subsequent devise. *Id.*

A controversy as to amount due upon executory contract to purchase would not prevent passing the real estate by devise. *Id.*

A devise of the residuary estate gives an equitable title to lands acquired after publication of will. *Id.*

A direction to pay all just and legal demands is of itself insufficient to charge the personalty with the principal or interest of the mortgage debts. *Carpenter v. Carpenter*, 131 N. Y. 101.

Where the will reserved the homestead for use of certain children without limitation as to time, they take it subject to the right of occupancy. *Id.*

General rule is that the death referred to in a will is intended to mean a death in the testator's lifetime.

Matter of Tienken, 131 N. Y. 391.

Equitable conversion is adopted only where it is a needed element to determine ownership. *Id.*

Wills—Continued.

Trustee under a will takes a legal estate commensurate with the equitable estate. *Id.*

A devise to executors during the life of testator's wife does not vest the entire legal estate in the trustees. *Id.*

Immediate possession of real estate not required to secure widow's annual income, should be given to the children. *Id.*

The general rule is controlled by evident intent of the testator.

Mead v. Maben, 131 N. Y. 255.

The gift of income is the gift of the property when there is no limitation of time attached.

Matter of Smith, 131 N. Y. 239.

Gift of income followed by gift of property on the happening of a contingency, is gift of income for intermediate period only.

Id.

Sale of property under an implied power of sale is valid.

Leggett v. Firth, 132 N. Y. 7.

Where the nature of the estate is indicated by her death it is a life estate. *Id.*

An expectant estate is not void because it is liable to be defeated.

Id.

Accumulations for more than two lives in being are invalid.

Greer v. Chester, 131 N. Y. 629.

Provisions authorizing a sale or mortgage of lands will not be deemed to create a trust.

Steinhardt v. Cunningham, 130 N. Y. 292.

V. WHO TAKE.

Where testator left no heirs-at-law, a devise of "dower right" conveys the fee in an undivided third of real estate.

Schult v. Moll, 132 N. Y. 122.

Upon the death of one holding such "dower right" the property devolved in equal shares upon her daughters. *Id.*

The law favors a construction which will prevent partial intestacy. *Id.*

The fact of making a will raises a strong presumption that the entire estate is disposed of. *Id.*

A valid devise or bequest may be limited to a corporation *non esse* provided it be erected within the time limited for vesting of future estates.

Tilden v. Green, 130 N. Y. 29.

Where the residuary estate is devised to the executors in trust, and they cause an institution to be incorporated, and convey to it, such action does not validate the trust. *Id.*

Where a widow takes a life estate with power to sell, she is entitled to sell without notice to her co-executrix.

Matter of Blauvelt, 131 N. Y. 249.

The latter is not chargeable with negligence in permitting the widow to receive the proceeds. *Id.*

Wills—Continued.

The widow was not liable for losses upon an accounting as executrix. *Id.*

The proceeds of sale took the place of the realty. *Id.*

A grantee is entitled to a marketable title.

Harris v. Stride, 132 N. Y. 392.

In order to effect the due execution of a power there must be a substantial compliance with its terms. *Id.*

The word "issue" used in the will, construed.

Chwatal v. Schreiner, 148 N. Y. 683.

Meaning of word "uses" considered. *Id.*

Where final distribution is to be made among a class, the benefits must be confined to those who answer to the description.

Matter of Baer, 147 N. Y. 348.

Case where bequests were void and amount thereof passed to the residuary legatees and not to the next of kin.

Carter v. Board of Education of the Presbyterian Church, 144 N. Y. 621.

All the beneficiaries must join in the election to take the land in its uncontroverted form when executors are empowered to sell.

McDonald v. O'Hara, 144 N. Y. 566.

A devise for life, with full power to devise, vests the absolute fee in the devisee.

Deegan v. Wade, 144 N. Y. 573.

The will of a testatrix who died in 1882 gave a portion of her estate to defendant upon the trust and confidence that he would dispose of it "among the charitable and benevolent institutions or corporations in the city of ——— as he shall deem proper." *Held*, that such attempted trust was unenforceable for failure to designate a beneficiary or to describe a class or kind of beneficiary to whom distribution is practicable or that can with reasonable certainty be identified.

People v. Powers, 147 N. Y. 104.

The right of a grantor to re-enter for breach of condition subsequently devolves upon his heirs-at-law.

Uppington v. Corrigan, 151 N. Y. 143.

A will construed that brothers and sisters took only in case sons died without heirs of the body then surviving.

Matter of Moore, 152 N. Y. 602.

Circumstances under which, *held*, that the son of the sister who died previous to the execution of the will was not included in the devise.

Matter of Allen, 151 N. Y. 243.

Circumstances under which, *held*, that a clause providing that residue of real estate, if any, should go to testator's heirs-at-law in the same proportion as if he had died intestate, was only effective if the wife died before testator.

Moffett v. Elmendorf, 152 N. Y. 475.

Wills—Continued.

A devise to testator's aunt and cousins in equal shares is not devised in a class, but as to certain devisees as tenants in common.

Id.

The right of a residuary devisee of an undivided share to sell or mortgage his interest is not cut off by the existence of a naked power of sale in the executors for the purposes of paying debts.

Drake v. Paige, 127 N. Y. 562.

Omission of name of a son of the testator as a recipient of a portion of the income of the trust estate did not justify the rejection of the will.

Matter of Forbes, affirmed without opinion in 128 N. Y. 640.

Upon the death of a child under the age of 30, legacy to be hers absolutely then, passed immediately to her next of kin or legatees.

Matter of Murphy, 144 N. Y. 557.

The executor of one entitled to a legacy has a right to receive it for the purposes of administration, notwithstanding the fact that a child of his testatrix was born after the making of the will, which made no provision for it.

Id.

Where one of the three residuary legatees corporations had not become incorporated at the time of testator's death, *held*, that its one-third of the residuary estate passed to the heirs and next of kin as in case of intestacy.

Booth v. Baptist Church of Christ, 126 N. Y. 215.

Case in which, *held*, that a gift was vested in each of the beneficiaries although they were not to receive their share until after the death of the person named.

Matter of Gardner, 140 N. Y. 122.

A will directed the devise of the testator's estate "among my heirs-at-law, in accordance with the laws of the state of New York, applicable to persons who die intestate," construed, that the intent of the testator was to distribute his property as in case of intestacy.

Larson v. Corlies, 127 N. Y. 100.

The capacity of the legatee to take a bequest depends upon the law of its domicil. Bequest to a "community" in the Grand Duchy of Baden sustained as it possesses right of self-government and could take property.

Matter of Huss, 126 N. Y. 537.

It is only in the case of an absolute devise or bequest to one, and in case of his death to another, that the words of survivorship are construed to refer to the time of the death of the testator.

Mullarky v. Sullivan, 136 N. Y. 227.

In a bequest of the residuary estate to testator's six children, words, "and if any of my said children should die without leaving any descendant, then to pay over the capital of such child's share to his or her surviving brothers and sisters," *held*, "brothers and sisters" did not include issue of a brother or sister who had died during the lifetime of a child dying without descendants.

Id.

Wills—*Continued.*

The rule that courts favor a construction which will permit the children of a deceased child to take, has no application in a case where the language of the will is plain and where the intention of the testator is so clearly expressed as to leave no room for construction. *Id.*

In its general sense, unconfined by any indication or intention to the contrary, the word "issue" includes in its meaning all descendants. *Drake v. Drake*, 134 N. Y. 220.

A power of appointment to all or any or either of testator's sisters, "or to all or any or either of the lawful issue of my said sisters," construed. *Id.*

An acceptance by a widow of the provision in a will, "in full satisfaction of dower," will bar her claiming a share in lapsed legacies. *Matter of Hodgman*, 140 N. Y. 421.

The rule that in case of a devise to one in fee, and in case of his death to another, the death referred to will be construed to be death in testator's lifetime, considered, and held not to apply where date other than testator's death is fixed for distribution.

Matter of Baer, 147 N. Y. 348.

Where an unincorporated society subsequently becomes incorporated it may take a gift of real property.

Lougheed v. Dykeman's Baptist Church, 129 N. Y. 211.

A testator may so provide for the future vesting of the title in his devisees, that in the meanwhile it will vest in his heirs by operation of law. *Id.*

When the word "issue" in a deed or will has the same meaning as "descendants." *Soper v. Brown*, 136 N. Y. 244.

Where testator devised property in trust for his daughter, and upon her death to her lawful issue, and, in default of issue, then to all his grandchildren, *held*, grandchildren and great-grandchildren of daughters took to the exclusion of testator's other grandchildren. *Id.*

It is a settled rule that where a will is capable of two constructions, one of which would exclude the issue of a deceased child, and the other permit such issue to participate in a remainder limited upon a life estate given to the ancestor, the latter should be adopted. *Id.*

A gift over of a share directed to be held in trust for a grandson, upon his death without issue, among testator's surviving children and the lawful issue of those who shall have died "in the same manner as hereinbefore provided," *held*, to require an absolute division upon the contingency indicated.

Duclos v. Benner, 136 N. Y. 560.

A bequest to an executor to carry out the wishes of testator is not an unconditional gift to such executor.

Matter of Ingersoll, 131 N. Y. 573.

A gift in a will of "the money of my husband's estate now be-

Wills—Continued.

longing to me," where testatrix's husband had recently died, and his estate was in course of administration, construed.

Sweet v. Burnett, 136 N. Y. 204.

Next of kin in a will does not include a wife although followed by a reference to the intestate succession laws.

Platt v. Mickle, 137 N. Y. 106.

A will under which, *held*, that the reference to death of a son without issue related to such death in the lifetime of testator.

Stokes v. Weston, 142 N. Y. 433.

The law favors equality among children in the distribution of estates. *Id.*

Property devised to "my heirs and my said wife's heirs, their heirs and assigns forever, share and share alike," gave to heirs *per capita* and not *per stirpes*.

Bisson v. West Shore R. R. Co., 143 N. Y. 125.

Held, also, that the time when the life estate terminated was the time when the gift to the remainderman took effect and when the persons who were to share as heirs could be ascertained only at the termination of the life estate. *Id.*

A gift to a class in a will construed.

Matter of Seebeck, 140 N. Y. 241.

The term children construed.

Matter of Truslow, 140 N. Y. 599.

Language should not be strained to work out a result favorable to the issue of a deceased child. *Id.*

Direction of testator's will that funds set apart for the benefit of each of his three children should, upon death of any one, be divided among the surviving children, *held*, explicit and entitled survivor to take the entire property. *Id.*

Case in which, *held*, that such shares should be divided between the last surviving child and grandchildren. *Id.*

Property devised to a son, with a provision to dispose of the same to his children, vests the property in the children on the death of the son, although he left no will.

Smith v. Floyd, 140 N. Y. 337.

Where a devise fails for any cause the heir will inherit.

Gallagher v. Crooks, 132 N. Y. 338.

The term "relations" when used in wills relating to personality only, embraces persons within the Statute of Distributions. *Id.*

A legacy to a creditor is not to be deemed in satisfaction of his debt unless it so appears.

Sheldon v. Sheldon, 133 N. Y. 1.

Where realty is to be divided among grandchildren after death of testator's widow, a child born before her death is included.

Hotaling v. Marsh, 132 N. Y. 29.

The refusal of widow to accept provision made for her did not affect such child's right. *Id.*

Wills—Continued.

A gift to a class of persons rests on the intention of the testator, and applies whether the legacy is vested or future.

Matter of Smith, 131 N. Y. 239.

Those of the class existing at the death of testator take a vested interest subject to let in after-born persons of that class, living when the division is made.

Id.

In the other, the happening of the event determines both the vesting and the persons entitled thereto.

Id.

An intention to include unborn grandchildren may be negatived in the face of the will.

Id.

Witness; See Affidavit; Evidence; Practice.

I. COMPETENCY.

1. *Generally.*

2. *Of Contracts.*

3. *Of Parties and other Interested Persons.*

4. *Of Husband and Wife.*

5. *As to Transactions with Deceased.*

II. CREDIBILITY.**III. RULES FOR EXAMINATION.**

1. *In Chief.*

2. *Cross-Examination.*

3. *Privileges of Witness.*

I. COMPETENCY.**1. Generally.**

Witness is not competent to testify as to the reputation of another unless he first is shown to have knowledge of it.

Carlson v. Winterson, 147 N. Y. 652.

Where an objection to the competency of witness need only be taken once.

Id.

A witness must be first shown to be familiar with the handwriting of the party before he may testify as to whether the writing was that of the party or not.

People v. Corey, 148 N. Y. 476.

A physician may testify as to the diseases for which he treated the insured under section 834 of the Code.

Redmond v. Industrial Benefit Ass'n, 150 N. Y. 167.

Evidence of handwriting by experts, considered.

People v. Murphy, 135 N. Y. 450.

A person who has conducted first-class boarding-houses in the same city is competent to testify to value of services of a house-keeper.

Edgecomb v. Buckhout, 146 N. Y. 332.

Upon the trial of an indictment for murder a physician, who was sent by the prosecution to examine the prisoner as to his

Witness—Continued.

sanity, was permitted to testify to what he stated to the witness about the killing, *held*, that this was within statutory prohibition. *People v. Sliney*, 137 N. Y. 570.

Evidence as to conversation held with a person regarding a third party disallowed.

Warner v. Press Publishing Co., 132 N. Y. 181.

One who is not an expert may testify that a substance is blood.

People v. Burgess, 153 N. Y. 561.

A principal debtor is not so interested as to be disqualified from testifying in behalf of his guarantor as to conversations with the deceased. *Beakes v. Da Cunha*, 126 N. Y. 293.

Where the testimony of the attorney would have been competent in an action between persons, it is also competent in an action between their personal representatives.

Hurlburt v. Hurlburt, 128 N. Y. 420.

Where no objection is specifically made, a physician may testify as to condition of witness at a certain period.

Patten v. United Life & Accident Ins. Assoc., 133 N. Y. 450.

It seems that the testimony was admissible as against such specific objection. *Id.*

A physician's certificate of death of an insured is not rendered inadmissible in behalf of the company in a subsequent action to recover the insurance money.

Buffalo Loan, Trust, etc., v. Knights Templar & Masonic Mut. Aid Asso., 126 N. Y. 450.

A physician may testify to the mental condition of a person where he confines his answers to such knowledge and information as he obtained when the person was not his patient.

Fisher v. Fisher, 129 N. Y. 654.

Hostility of a witness may be shown by any competent evidence.

People v. Brooks, 131 N. Y. 321.

It is not necessary that he be first examined as to his hostility.

Id.

The extent to which such an examination may go is in the discretion of the court. *Id.*

Accumulative evidence of hostility is not ground for reversal.

Id.

2. Of Convicts.

How the testimony of an accomplice cannot be discredited.

People v. Mayhew, 150 N. Y. 346.

When the defendant in a criminal case elects to become a witness he is not to be deemed compelled to be a witness against himself; and the extent to which disparaging questions may be put to him is in the discretion of court.

People v. Webster, 139 N. Y. 73.

3. Of Parties and other Interested Persons.

Whether a plaintiff in partition, seeking to avoid a will of her

Witness—Continued.

father for undue influence exercised by one of the defendants, is competent to testify as a witness as to a conversation which she overheard between the deceased and such defendant,—query.

Petrie v. Petrie, 126 N. Y. 683.

In an action for absolute divorce the testimony of plaintiff as to the charges, though incompetent under section 831 of the Code, must be received.

McCarthy v. McCarthy, 143 N. Y. 235.

The fact that the witness is a brother of plaintiff and occupies the same position in regard to another claim of similar nature will not disqualify him from testifying.

Lyon v. Ricker, 141 N. Y. 225.

In an action by the grantee in a deed executed by a deceased person to recover its possession from a third person to whom such grantor is alleged to have delivered it for the plaintiff, defendant cannot testify to what took place between him and grantor regarding delivery of deed to plaintiff.

Id.

Proof on behalf of plaintiff of declarations of deceased grantor, made at a different time will not open the door for the admission of the latter.

Id.

In an action of ejectment the plaintiff's mother was competent to testify to her marriage with defendant's ancestor prior to plaintiff's birth for the purpose of establishing plaintiff's title as heir-at-law.

Eisenlord v. Clum, 126 N. Y. 552.

4. Of Husband and Wife.

Where the husband is an interested party, he is an incompetent witness.

Luetchford v. Lord, 132 N. Y. 465.

Where the husband sues by virtue of his common-law right to wife's services, her testimony is admissible.

Porter v. Dunn, 131 N. Y. 314.

The provisions of Penal Code, section 715, against husband and wife being compelled to disclose confidential communications, do not leave the matter entirely to the discretion of the witness, but the other party interested may object to any such communications.

People v. Wood, 126 N. Y. 249.

5. As to Transactions with Deceased.

When an executor is precluded by section 829 of the Code from testifying on the settlement of his accounts, as against contesting residuary legatees.

Matter of Smith, 153 N. Y. 124.

A note of a decedent is not "testimony of a deceased person," within the meaning of section 829 of the Code.

Matter of Callister, 153 N. Y. 294.

A tenancy by the curtesy initiate in lands which the wife has the legal right to sell does not make the husband a person interested so as to render him incompetent under section 829 of the Code as a witness after the death of the wife in a suit to foreclose a mortgage, even if he joined in the mortgage.

Albany County Savings Bk. v. McCarthy, 149 N. Y. 71.

Witness—Continued.

A question as to a personal transaction with deceased, disallowed.
Sallade v. Gerlach, 132 N. Y. 548.

The appellate court must presume that the preliminary fact was correctly decided. *Id.*

A son of the deceased not a party to the action with no interest in the agreement is not incompetent, under section 829, to testify to conversations had with his father.

Hirsh v. Auer, 146 N. Y. 13.

Evidence of an admission by defendant as to an agreement made by him with a deceased person is not incompetent under section 829 of the Code. *Id.*

Under section 829 of the Code a beneficiary under a will is incompetent to testify as to the conversation between testator and attesting witness. *Matter of Bernsee*, 141 N. Y. 389.

A witness otherwise disqualified may testify to a conversation between the deceased and a third person in which the witness took no part whatever. *O'Brien v. Weiler*, 140 N. Y. 281.

The release by one plaintiff of his interest will not render him competent as a witness. *Id.*

Section 829 of the Code recognizes the right of a party suing an executor to testify to a personal transaction between him and the deceased after executor has testified to the transaction.

Martin v. Hillen, 142 N. Y. 140.

In such cases the witness cannot explain or contradict the executor's testimony by means of another and independent transaction between himself and deceased. *Id.*

A witness having testified to conversation with defendant, the introduction by plaintiff of letters written subsequently to the alleged conversation was error. *Root v. Borst*, 142 N. Y. 62.

What will not authorize a defendant to testify in his own behalf as to his own transactions with the deceased.

Rogers v. Rogers, 153 N. Y. 343.

What does not authorize a defendant to testify that a note was a gift made by the decedent. *Id.*

An executor may be examined in his own behalf in defense of a claim against the estate. *McLaughlin v. Webster*, 141 N. Y. 76.

It seems that such testimony by the executor renders the plaintiff a competent witness in regard to the same transaction. *Id.*

II. CREDIBILITY.

The rule that undisputed testimony of a witness who is not impeached or discredited must be taken by the jury as true, does not apply in criminal cases.

People v. Tuzckewitz, 149 N. Y. 240.

Where there is a clear contradiction between the testimony of a witness and his sworn answer as a defendant he should be per-

Witness—Continued.

mitted to testify in explanation thereof that his attorney advised there was no legal difference. *Ferris v. Hard*, 135 N. Y. 354.
Where the plaintiff has permitted the contradicted evidence to be given, it is then too late to object to the explanation as precluded by the answer. *Id.*

The jury is not bound to believe the party testifying, but they may do so.

Reid v. Mayor, etc., of N. Y., affirmed, 139 N. Y. 534.
The interest which a witness has in the subject of the controversy is a material injury, as it bears upon the question of credibility.

Matter of Snelling, 136 N. Y. 515.
The general counsel of a woman for years, ostensibly acting for her in negotiating a sale of land without informing her that he is acting for the purchaser, is not entitled to have his evidence given equal weight with her testimony where she is sued for specific performance by purchaser.

Palmer v. Gould, 144 N. Y. 671.
How a foundation of impeachment of witness must be laid and what it must contain. *People v. Youngs*, 151 N. Y. 210.

It is not competent to compel witness to testify even that he has been indicted. *Van Bokkelen v. Berdell*, 130 N. Y. 141.

A party cannot impeach the credibility of his own witness.

Hankinson v. Vantine, 152 N. Y. 20.
Evidence as to threats made shortly before the commencement of the action is admissible as affecting credibility of party making threats. *Lamb v. Lamb*, 146 N. Y. 317.

Where it is made to appear on the cross-examination of the defendant that he has been confined in a penitentiary, it is proper to show the nature of the crime for which he was imprisoned.

Carlson v. Winterson, 147 N. Y. 652.
The fact that the witness was a customer of the bank and transferred to it the note in suit, is not sufficient to make his credibility a question for the jury.

American Exchange Nat. Bk. v. New York Belting & Packing Co., 148 N. Y. 698.

Where the alleged fraudulent vendor of chattels testified on behalf of the vendee on support of the good faith of the sale, he may properly be questioned as of his having made admissions contrary to the evidence he has thus given.

Beuerlien v. O'Leary, 149 N. Y. 33.

III. RULES FOR EXAMINATION.**1. In Chief.**

When it is error for court to charge that affidavit does not contradict a former one. *Wendt v. Craig*, 147 N. Y. 697.

An offer to show character of witness on cross-examination will be excluded. *Palmeri v. Manhattan Ry. Co.*, 133 N. Y. 261.

Witness—Continued.

Evidence to impeach a witness by admissions made by him after he has testified before a referee cannot be admitted.

McCulloch v. Dobson, 133 N. Y. 114.

An accused person becoming a witness in his own behalf places himself in the attitude of any other witness.

People v. Tice, 131 N. Y. 651.

2. Cross-Examination.

A witness may be re-examined on all topics on which he has been cross-examined, although such cross-examination related to inadmissible facts.

People v. Buchanan, 145 N. Y. 1.

A defendant in a criminal prosecution, who has taken the stand in his own behalf, is subject to the same rules of examination as any other witness.

People v. McCormick, 135 N. Y. 663.

It is proper on cross-examination to inquire as to the facts stated on a former trial by the same party.

People v. Hoch, 150 N. Y. 291.

The exclusion of evidence called for by questions on the cross-examination of a witness on the trial of an action on a building contract, as to whether there had been any disagreement between him and the architect, *held*, error.

Garnsey v. Rhodes, 138 N. Y. 461.

Where, in a criminal case, defendant's counsel was a witness in his behalf, *held*, that it was not error to allow the prosecution to show on cross-examination that he had a wager on the result of the trial.

People v. Parker, 137 N. Y. 535.

3. Refreshing the Memory.

The constitutional provision that no person shall be compelled in a criminal case to be a witness against himself should receive a liberal application.

People ex rel. Taylor v. Forbes, 143 N. Y. 219.

A witness must as a rule be allowed to judge for himself as to the effect of his answer.

Id.

The fact that he has denied personal participation in the affair concerning which he is interrogated does not preclude him from asserting his privilege.

Id.

A party calling one of the two physicians who attended him waives privilege by section 834 of the Code to object to the testimony of the other as to the transaction where both attended.

Morris v. N. Y. O. & W. R. R. Co., 148 N. Y. 88.

The statutory privilege against disclosure by physicians was not conferred to shield a person charged with the murder of the patient.

People v. Harris, 136 N. Y. 423.

A waiver in an application for insurance of the provisions of section 834 of the Code is not against public policy.

Foley v. Royal Arcanum, 151 N. Y. 196.

The privilege under Code Civil Procedure (§ 835), attaching to a

Witness—Continued.

professional communication with an attorney, does not apply to a case where two or more persons consult him for their mutual benefit.

Hurlburt v. Hurlbert, 128 N. Y. 420.

Before section 835 of Code has any application, the relation of attorney and client must be proved.

Rosseau v. Blean, 131 N. Y. 177.

Where the relation is proven, the attorney is competent to prove delivery of deed to him for the purpose of delivering it to another.

Id.

Work, Labor and Services ; *See Contracts.*

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